EDITOR'S NOTE

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No. 84-1077-CFX
Status: GRANTED

Docketed:
December 31, 1984

Title: Carol Whitley, Individually and as Assistant Superintendent, Oregon State Penitentiary, et al., Petitioners
v.
Gerald Albers

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Mountain Jr., James E.

Counsel for respondent: Mechanic, Gene

Entry	Date	Note	Proceedings and Orders
1	Dec 31 1984	G	Petition for writ of certiorari filed.
2	Feb 2 1985		Waiver of right of respondent Gerald Albers to respond filed.
3	Feb 6 1985		DISTRIBUTED. February 22, 1985
4	Feb 21 1985	P	Response requested. (Due March 27, 1985 - NONE RECEIVED)
6	Mar 11 1985		Order extending time to file response to petition until April 27, 1985.
7	Apr 19 1985		Brief of respondent Gerald Albers in opposition filed.
8	Apr 19 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	May 7 1985		REDISTRIBUTED. May 23, 1985
11	May 31 1985		REDISTRIBUTED. June 6, 1985
12	Jun 10 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
13	Jun 10 1985		Petition GRANTED.
			**********
14	Jun 24 1985	G	Motion of respondent for appointment of counsel filed.
16	Jul 2 1985		Order extending time to file brief of petitioner on the merits until August 15, 1985.
17	Jul 17 1985		DISTRIBUTED. Sept. 30, 1985. (Motion of respondent for appointment of counsel).
19	Aug 13 1985		Order extending time to file brief of respondent on the merits until September 30, 1985.
20	Aug 16 1985		Brief amicus curiae of United States filed.
21	Aug 16 1985		Brief of petitioners Whitley, Asst. Supt., et al. filed.
22	Aug 17 1985		Joint appendix filed.
23	Sep 4 1985		Record filed.
24	Sep 30 1985		Brief amicus curiae of Correctional Association of NY, et al. filed.
25	Sep 30 1985		Brief of respondent Gerald Albers filed.
26	Oct 7 1985		Motion for appointment of counsel GRANTED and it is ordered that Gene B. Mechanic, Esquire, of Portland, Oregon, is appointed to serve as counsel for the respondent in this case.
27	Oct 18 1985		CIRCULATED.
28	Oct 22 1985		SET FOR ARGUMENT, Tuesday, December 10, 1985. (1st case).
29	Dec 2 1985	X	Reply brief of petitioners Whitley, Asst. Supt., et al.

No. 84-1077-CFX

Entry	Date	Note	Proceedings and Orders
30	Dec 10 1985		filed. ARGUED.

84-1077

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et.al.,

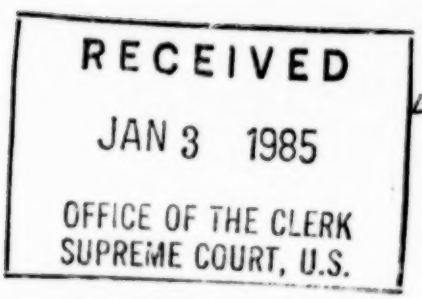
Petitioners,

v.

GERALD ALBERS

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit



DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
MICHAEL D. REYNOLDS
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed are as follows: Gerald Albers (respondent herein); Harol Whitley, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary, Hoyt C. Cupp, individually and in his official capacity as Superintendent at the Oregon State Penitentiary, J.C. Keeney, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary, and Robert Kennecott, individually and in his official capacity as a correctional officer at the Oregon State Penitentiary (petitioners herein).

QUESTION PRESENTED

Is the Eighth Amendment prohibition of cruel and unusual punishment violated, so as to expose prison officials to liability for damages under 42 U.S.C. 1983 for their use of deadly force in quelling a prison riot, when some evidence, viewed in a light most favorable to an injured prisoner, establishes nothing more than an unprivileged common law battery?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harol Whitley, et al., respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Albers v. Whitley, et. al.*, No. 82-3551 (October 1, 1984).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Gerald Albers v. Harold* [*sic*] *Whitley*, 743 F.2d 1372 (9th Cir. 1984). A copy of the opinion is attached to this petition as Appendix A. The opinion of the United States District Court is reported as *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982). A copy of that opinion is attached to this petitition as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on October 1, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and Rule 29(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

1. *Summary of Facts*

The evidence, viewed in the light most favorable to the respondent, supports the following factual summary.[1]

Respondent Albers was a prisoner housed in Cellblock "A" at the Oregon State Penitentiary. He brought a claim for damages under 42 U.S.C. § 1983 after he was shot in the knee by petitioner prison officials while they were quelling a prison disturbance on June 27, 1980. Petitioner Whitley was security manager of the penitentiary; Cupp was superintendent; Keeney was an assistant superintendent; and Kennecott was a corrections officer.

On the night of June 27, 1980, several inmates in Cellblock "A" became agitated by what they viewed to be mistreatment

[1] This case was before the Ninth Circuit on review of a district court order directing judgment for petitioners, the defendants below. The facts set forth in the Statement of the Case are taken almost verbatim from the opinion of the Ninth Circuit, 743 F.2d at 1373-74, 1376. (Appendix A, App-2 - App-4). Petitioners also rely on the statement of facts in the opinion of the U.S. District Court for the District of Oregon, 546 F. Supp. at 729-31 (Appendix B, App-16 - App 22).

by prison guards of other inmates being escorted through the cellblock. Because of the ensuing commotion and the inmates' tense mood, an early "cell-in" order was given. Some inmates resisted the cell-in order and began to break furniture. One inmate, Richard Klenk, became particularly upset. After confronting two guards, he assaulted one of them. The assaulted guard left the area to report the disturbance. The other guard was taken hostage by the inmates and removed to cell 201 on the second floor of the cellblock.

After prison authorities were notified of the disturbance, security manager Whitley went to speak with Klenk. A few attempts were made to demonstrate that the inmates whom the prisoners were originally concerned about were unharmed. The disturbance, however, continued. Whitley checked the condition of the prison guard being held hostage and found him to be unharmed.

Whitley then began organizing an assault squad. At some point, prison officials discovered Klenk had a knife, and they learned he had claimed to have killed one inmate and that others would die. Klenk also threatened to kill the hostage. Whitley returned to the cellblock to see that the hostage was still unharmed. He was told by other inmates that they would protect the guard.

Respondent Albers left his cell at an inmate's request to see whether he could aid in quieting the disturbance. Albers asked Whitley if he would return with a key to the lower tier cells to allow those on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley

said that he would return with the key. As Whitley left, he noticed the inmates had constructed a barricade that limited access to the cellblock.

The prison officials discussed the situatien and agreed that tear gas could not be used.[2] Superintendent Cupp thereupon ordered Whitley to take a squad armed with shotguns into "A" block. He gave instructions to "shoot low."

Whitley reentered the cellblock and was followed by three armed guards. There is evidence that Albers asked for the key and that Whitley screamed "shoot the bastards" as he ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage. It was also the only route by which Albers could return to his own cell.

Warning and second shots were fired. Whitley chased Klenk to the upper tier and subdued him, with the help of several inmates, outside the door to the cell where the hostage

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[2] As the district court observed:

> Here, a decision was made by the defendants not to use tear gas or mace. There was concern whether prison officials could maneuver through the barricade and administer the gas quickly enough to assure that no harm came to the hostage. There was also concern whether gas would have the necessary effect in the relatively large area of cellblock "A." Gas would cause great discomfort to the majority of inmates who had obeyed the cell-in order and were in their cells.

546 F. Supp at 734.

Albers' testimony confirmed the prison officials' concern that tear gas would not be effective. According to Albers, prior to the prison officials' invasion of the cellblock, word had spread throughout the cellblock that gas would be used and prisoners soaked towels and sheets with water to render the gas ineffective. (Tr. 142-143).

was being held. Meanwhile, Albers was shot in the knee by Kennecott while Albers ran up the stairs behind Whitley.

The hostage guard was released unharmed. One other inmate had been shot on the stairs, and others on the lower tier also were injured by gunshot.

2. *Procedural History*

Albers filed a complaint in the federal district court for damages under 42 U.S.C. § 1983, pursuant to 28 U.S.C. § 1343.

At trial before a jury, Albers presented two experts who testified that other measures, less drastic than those taken by the prison officials, could have been employed to quell the disturbance. Albers' first expert, Mr. Brewer, testified that less drastic measures included tear gas and assault squads armed with riot batons. He opined that the use of deadly force under the circumstances of this case, taking its timing into account, was unnecessary to prevent imminent danger to the hostage or other inmates.[3] He also testified that the use of deadly force was excessive under the circumstances at the time it was used, and that reasonable corrections policy would dictate that a verbal warning be given immediately before shooting. Albers second expert, Mr. Perkins, testified that the prison authorities should have acted differently, and that

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[3] Mr. Brewer's reference to the use of "deadly force" is misleading on at least two accounts. First, the uncontradicted evidence is that Superintendent Cupp instructed the assault squad to shoot low, thereby minimizing if not eliminating the possibility that anyone would actually be killed. Second, Mr. Brewer, testified that a less drastic measure which should have been utilized — invasion by a riot squad armed with riot batons — could also result in death or serious injury given prison guards' training in the use of such weapons. (Tr. 289).

they were "possibly a little hasty in using firepower" on the inmates. Petitioners' experts controverted the testimony of Albers' experts.

At the conclusion of the trial, petitioners moved for a directed verdict on the basis that the testimony was insufficient to permit the jury to find a violation of Albers' Eighth Amendment right not to be subjected to cruel and unusual punishment. The district court granted the motion and entered a written decision. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982).

Respondent appealed to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The Ninth Circuit reversed the judgment of the district court. It held that Albers presented sufficient evidence of an Eighth Amendment violation. It ruled that based on the expert testimony presented, "a jury could have concluded that the prison officials' 'riot plan' was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d at 1376. The Ninth Circuit also addressed petitioners' qualified immunity claim. It held that upon retrial, if a jury should conclude that Albers was subjected to cruel and unusual punishment, the defense of qualified immunity would not be available to petitioners.

REASONS FOR ALLOWANCE OF WRIT

1. This case reduces to a controversy over whether prison administrators, confronted with a serious prison riot and

imminent risk of loss of life of inmates and guards, made an incorrect assessment of how best to defuse that threat and regain control of the cellblock. Plaintiff's evidence, the Ninth Circuit held, was sufficient at least to create a jury question on whether plaintiff suffered cruel and unusual punishment at the hands of prison officials. Under the Ninth Circuit's opinion, misjudgment can equate with deliberate indifference and a jury can find wantonness from evidence of imprudence. The Ninth Circuit, we submit, has laid a new foundation for Eighth Amendment analysis. On this base, the court has built an edifice that embodies principles closely akin to common law tort and drastically different from what historically and contemporarily have been recognized to reflect the spirit and purpose of the cruel and unusual punishment clause.

This case arises from a riot in an open cellblock housing over 200 inmates and located within a maximum security prison. A prison guard was held hostage for over two hours while petitioners attempted to negotiate his release from an armed inmate who repeatedly threatened to kill the guard as well as other inmates, and who reportedly had already killed one inmate. The unsuccessful negotiations took place against a background of commotion and uproar within the cellblock which included the destruction by inmates of most of the cellblock furniture. Ultimately, petitioners were successful in quelling the riot with no loss of life, although some inmates, including respondent, did incur injuries. No evidence suggested and no claim was made that petitioners continued to use force after regaining control of the cellblock or that

injuries were inflicted in retribution or retaliation for the inmates' riotous and violent conduct.

At trial, each side presented expert testimony. Plaintiff's experts were of the opinion that, although action to regain control of the cellblock was needed, the measures taken were too extreme. Mr. Brewer testified to alternative and, in his view, less drastic measures (*e.g.*, sharpshooters, riot formations, tear gas) that in his judgment could have been employed effectively. Mr. Perkins testified that prison administrators, given all the circumstances, might have been "possibly a little bit hasty" in taking the action they took to stop the riot. Defendants' experts, in contrast, believed that the action taken was appropriate, and that the alternative procedures proposed by plaintiff's experts would have been ineffective, less effective or might even have aggravated the danger. In short, one set of experts pointed to errors in the judgment of the prison administrators, the other set of experts said no error in judgment was involved.

Evidence such as that presented in this case, even cast in the light most favorable to plaintiff, does not rise to the level of an Eighth Amendment violation upon which a jury should be permitted to find liability for damages. For the Ninth Circuit to so hold is error. The Ninth Circuit's error lies in the legal standard it fashioned and applied to test whether evidence creates a jury question on a cruel and unusual punishment claim arising out of a prison riot situation. The Ninth Circuit stated:

> In our view, a proper standard deems the eighth amendment to have been violated when the force used is "so unreasonable or excessive [as] to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was *unnecessary*, Albers' constitutional right would have been infringed. . . .

743 F.2d 1375 (emphasis added).

The Ninth Circuit's opinion points to evidence that the riot was subsiding at the time of official action as support for an inference that the force used was excessive. At greater length, the lower court discussed and canvassed the conflict in the expert testimony on whether less drastic measures reasonably could have and should have been used to stop the riot. On the basis of the conflicting expert opinions, the Ninth Circuit concluded that a jury possibly could have found that "the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d 1376.[4]

The Ninth Circuit's analysis of plaintiff's constitutionally

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[4] It is questionable whether the evidence even presented a jury issue on the issue of reasonableness. The district court judge, after listening to all the evidence, determined that no reasonable jury would conclude that the force used by petitioners to restore order and security in Cellblock "A" was unreasonable:

> Defendants here were faced with a situation that had extreme potential danger to a hostage guard and to inmates. Possible alternatives to force were reasonably considered and rejected. While plaintiff's experts suggested possible riot formations, tear gas, and sharpshooter alternatives, it would be speculative to conclude that such other alternatives would have been more effective in securing the release of the hostage and the safety of the inmates. The safety of the hostage and the nonrioting inmates was of paramount importance to the defendants."

546 F. Supp. at 734.

based cruel and unusual punishment ciaim differs not a whit from the standard that would apply in a common law tort action arising from police actions in a situation where persons in the community had taken control of a nuclear power plant, held an employee of the plant hostage, and threatened to kill the hostage, and then, in an effort to gain control of the property, police shot and injured one or more people. The claim by those injured would be for tortious assault and battery. The response by police undoubtedly would be to claim the privilege of self-defense or defense of others and the privilege to use deadly force relating to a riot, which under such circumstances overlap. *See, e.g., Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (damages sought for death and injuries from gunfire used by police to stop student riot). The inquiry for the jury in such a case would be whether the degree of force used was unreasonable or excessive in relation either to real danger, or to danger reasonably believed to exist. To meet this standard it would have to be shown that the actor considered whether lesser force would prevent the apprehended harm. *See*, Prosser on Torts, §§ 19 and 20 (Hornbook Ed. 1971); Restatement (Second) of Torts, § 70(1), comments b and c; *Burton v. Waller, supra* at 1276-78.

Although the Ninth Circuit opinion recites language like "deliberate indifference" and "unnecessary and wanton" infliction of physical pain, the circuit court was willing to find those Eighth Amendment inquiries satisfied where there was evidence sufficient to create a jury question on the common law tort privilege of self-defense or defense of others. The

lower court unquestionably has grafted a tort standard onto the Eighth Amendment. This cannot be correct.

In the well-developed body of Eighth Amendment case law of this Court, two principal themes repeatedly are emphasized. First, the proscription against cruel and unusual punishment is addressed not only to tortuous and other barbarous methods of punishment; it extends also to the needless, callous or deliberately indifferent infliction of pain and suffering, when the degree of pain inflicted exceeds modernly tolerable limits and is totally without penological justification or purpose. *See generally Gregg v. Georgia*, 428 U.S. 153 (1976); *Rhodes v. Chapman*, 452 U.S. 337 (1981). Second, although courts must act to protect prisoners from cruel and unusual punishment, they must exercise caution in judging the actions of prison administrators. The task of prison administrators is a complex one calling for considerable expertise and judgment. Standards articulated under the Eighth Amendment must accord considerable latitude in judgment to the officials charged with prison management in order to avoid mere judicial second-guessing of the sensitive and delicate problems of prison administration. *See, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974). Neither of these fundamental themes is accommodated by the Ninth Circuit's decision below.

The Eighth Amendment concern of cruel and unusual punishment is significantly devalued if the standard for such punishment is the same standard imposed for civil torts

between ordinary citizens. This Court recognized as much in a different Eighth Amendment context, the provision of medical services to prisoners. In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court rejected, in the strongest of terms, the notion that tort standards for medical negligence (*i.e.*, malpractice) could provide the benchmark for a claim of cruel and unusual punishment:

> an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 105-06 (footnote omitted). The decision in *Estelle* concluded that the Eighth Amendment, in the area of inmate medical needs, was addressed to a more serious evil. To constitute cruel and unusual punishment, a failure to meet an inmate's medical needs must be grave enough to "produce physical 'torture or a lingering death' " or "result in pain and suffering which no one suggests would serve any penological purpose." 429 U.S. at 103. "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency." *Ibid.*

Unlike *Estelle v. Gamble*, the concern here is not with malfeasance or nonfeasance and tort concepts of negligence. This case involves, instead, intentional action. The force employed by prison administrators, without question, was used deliberately and by design. But *Estelle v. Gamble* nevertheless makes the essential point. The cruel and unusual punishment clause was designed to address more serious affronts to human physical dignity than those generally addressed by common law tort notions. Injurious force used to stop an outbreak of life-threatening violence within prison walls may be excessive, but that does not speak to whether it also is cruel and unusual punishment. Prison administrators, in choosing to use such force, may be imprudent, unwise or unreasonable. That fact, too, fails to bear on whether the action constitutes cruel and unusual punishment.

The issue, under the Eighth Amendment, must focus squarely and directly on whether the action taken results "in pain and suffering that no one suggests would serve any penological purpose." *Estelle v. Gamble, supra.* In a prison riot setting, where there is no dispute that remedial action should have been taken, and the only disagreement is whether the degree of force used was proportionate to the perceived danger, the cruel and unusual punishment clause has no application. In that setting, the Eighth Amendment is triggered only where the force is wholly without penological purpose.

Where prison administrators are, as here, presented with a prison riot in which the lives of prisoners and guards alike are

threatened, we submit that the cruel and unusual punishment clause rarely will be implicated. In extreme or unusual instances, however, it might be. For example, if injurious force is used after prisoners have relinquished their weapons and attempted to surrender to prison authorities, such force would be without penological purpose. Similarly, force grossly disproportionate to the danger, such as an order to shoot and kill any and all prisoners out of their cells, would suggest, under these circumstances, that deadly force was used not for the proper penological purpose of regaining control, but instead to retaliate and punish everyone participating in any fashion in the disturbance. Such hypotheticals suggest the wanton infliction of unnecessary pain which the Eighth Amendment addresses; borderline disputes between experts over the most desirable or least drastic methods of controlling a prison disturbance do not.[5]

The equally serious danger of the lower court's decision is

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[5] Indeed, the testimony of Albers' experts in this case established little more than that petitioner prison officials could have employed more desirable methods to control the situation. As this Court observed in *Rhodes v. Chapman*, 452 U.S. at 348, n. 13:

> Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. As we noted in *Bell v. Wolfish*, 441 U.S., at 543-544, n. 27, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." . . . Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as "the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion). We could agree that double celling is not desirable, especially in view of the size of these cells. But there is no evidence in this case that double celling is viewed generally as violating decency. . . .

that it invites second-guessing of the most sensitive decisions that prison officials are called on to make. Time and again, this Court has recognized that the task of managing prisons is extremely complex and difficult, and that the problems facing prison officials in the day-to-day operation of prisons are not susceptible to easy solutions. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Procunier v. Martinez*, 416 U.S. 396 (1974). This Court also has recognized that the task of running prisons has been delegated to the legislative and executive branches of government, not to the judiciary. The power to devise a prison system and the duty to make the wide range of judgment calls required for efficient and effective prison administration rest with state corrections officials. *Bell v. Wolfish*, 441 U.S. at 548, 562; *Meachum v. Fano*, 427 U.S. 215, 229 (1976). The case law pragmatically has acknowledged that state prison administrators, unlike judges, are experts in the management and operation of state prisons. *See Bell v. Wolfish*, 441 U.S. at 548; *Procunier v. Martinez*, 416 U.S. at 405; *Meachum v. Fano*, 427 U.S. at 229. As stated in *Procunier v. Martinez*, 416 U.S. at 404-405:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of

> prisons in America are complex and intractable, and more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Moreover, prison officials, particularly those in maximum security facilities such as the Oregon State Penitentiary, must supervise and attempt to rehabilitate inmates who are "not usually the most gentle or tractable of men and women." *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) (Friendly, J.). Given limited space and limited resources, prison officials must attempt to maintain order, discipline, and above all the safety and security of prison inmates and corrections personnel. It is essential in pursuit of these objectives that prison officials maintain a regime of close supervision and discipline, *Rhodes v. Chapman*, 452 U.S. at 350, for "[t]he danger of prison riots is a serious concern, shared by the public as well as by prison authorities and inmates." *Id.* at 349, n.14.

For these and other reasons,

> [p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. . . .
>
> . . . Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security.

Bell v. Wolfish, 441 U.S. at 547.

When a prison riot erupts, however, the task of prison officials is to restore, rather than to attempt to maintain, order and discipline. In the judgment of prison officials involved at the scene of the riot, drastic and immediate measures may be deemed necessary to achieve this objective. Prison officials must be accorded wide latitude in their tasks of quelling the disturbance and of restoring order and security. They should not be deterred in the pursuit of their lawful and immediate objectives by the fear that one false step, no matter how well intentioned, may subject them to future liability at the hands of prisoners who may incur injury or even death as a result of measures prison officials deem necessary to bring an end to the chaos.

The tort-like standard articulated and applied by the Ninth Circuit not only fails to accord wide latitude to the judgment of prison administrators, it fails to accord any meaningful latitude at all. Prison administrators are left to walk a fine line. They dare not misjudge whether less drastic measures would be as effective to regain control; they dare not mistakingly estimate that the level of force used is proportionate to the threat posed by the riot; they dare not be less than perfectly reasonable and prudent. If they even arguably deviate from the most reasonable course, a prisoner-plaintiff may be able to find an expert who, judging the administrators' actions by hindsight and in the tranquil environment of life outside prison walls, will conclude that the administrators acted "a little bit hasty," or that they first should have

experimented with other means to quell the riot. Liability can attach even though other experts conclude that the action taken was eminently appropriate, reasonable and sound. The Ninth Circuit's decision thus, in short, invites the trier of fact to second-guess fully the judgments made by prison officials as they attempt to react to life-threatening emergencies within institutional walls.

To meet the initial burden of proving an Eighth Amendment violation, it should not be sufficient for a prisoner merely to present some testimony that less drastic methods than those employed by prison officials equally may have been effective in quelling the disturbance, freeing prison officials held hostage, and restoring order and security. Nor should it be sufficient for a prisoner merely to show that the prison officials should have known that the situation was not as severe as they perceived it to be, thus calling for less force than actually employed. All such evidence does, without more, is prove a prima facie tort case.

An appropriate Eighth Amendment standard of conduct would subject prison officials to liability for their action in the course of a prison riot or disturbance where one or more hostage is being held only if they act wantonly, in a manner grossly disproportionate to the situation as perceived, or totally without penological justification. Such a standard would embody the concept of punishment that is cruel and unusual, and such a measure would not unduly hamper prison officials in the performance of their duty.

2. Having announced a new "unreasonable force" Eighth Amendment standard under guise of a "deliberately indifferent" rubric, the Ninth Circuit proceeded to strip petitioner prison officials of their right to claim qualified immunity. The lower court's holding that no qualified immunity defense was available to petitioners conflicts with this Court's recognition that public officials may claim qualified immunity in § 1983 actions when a constitutional right is not clearly established at the time an action occurred. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Procunier v. Navarette*, 434 U.S. 555 (1978). *See also, Davis v. Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984). If this Court should reach the immunity question, in the event it approves of the Ninth Circuit's finding of a potential Eighth Amendment violation, it nevertheless should grant review and reverse the circuit court decision to rectify the anomoly.

The Ninth Circuit concluded that a jury's finding that prison officials subjected an inmate to cruel and unusual punishment necessarily would negate any claim that the officers acted in good faith and thus were entitled to the defense of qualified immunity. The court said:

> The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punish-

> ment would violate a right "clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

743 F.2d at 1376. The principal flaw in this reasoning, of course, is that lower court's civil assault and battery standard for evaluating official response to prison riots previously had not been announced.[6]

In *Procunier v. Navarette*, 434 U.S. at 565, this Court ruled that a claim of qualified, "good faith" immunity by prison officials could not be rejected as a matter of law, "[b]ecause they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. . . ." Drawing on this precedent, the Court stated in *Harlow v. Fitzgerald*, 457 U.S. at 818, that "government officials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As this Court explained,

> [i]f the law at [the time an action occurred] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

Ibid.

In analyzing the availability of the qualified immunity defense, the Ninth Circuit failed to focus on whether, in the

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[6] In fact, under state law, prison officials are immune from liability for "[a]ny claim arising out of riot, civil commotion, or mob action or out of any act or omission in connection with the prevention of any of the foregoing." Or. Rev. Stat. § 30.265(3)(e).

context of a prison riot, prisoners had a clearly established constitutional right to be free from the use of unreasonable force. Assuming for the sake of argument that the Ninth Circuit correctly concluded that merely unreasonable force to quell a prison riot is forbidden by the Eighth Amendment, such a standard was not clearly established when the prison outbreak in this case occurred. Until the Ninth Circuit's decision in this case, only one other circuit court apparently had enunciated a reasonable force rule for prison officials, but that announcement was made with regard to a due process claim by a pre-trial detainee in a case that did not arise from a prison riot. *See, Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980) ("only reasonable force under the circumstances may be employed"). *Cf. King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) ("unjustified striking, beating or infliction of bodily harm upon a prisoner . . . without just cause"). In fact, the vast majority of the circuit courts that have analyzed prisoner § 1983 claims based either on the Eighth Amendment or the Due Process Clause have followed Judge Friendly's approach in *Johnson v. Glick*, 481 F.2d at 1033:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and *whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm*. . . .

(Emphasis added).[7]

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[7] *See, e.g., Norris v. District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984);

(Footnote continued on next page)

The Ninth Circuit, thus, had no basis for concluding, sub silentio, that the standard it employed was "clearly established" Eighth Amendment law. Its cavalier treatment of petitioners' immunity warrants this Court's attention and correction.

CONCLUSION

The Ninth Circuit enunciated and applied in this case a standard of conduct that potentially subjects state prison officials to liability for damages under 42 U.S.C. § 1983 and the Eighth Amendment any time experts disagree that the force used to quell a prison riot and to restore order and internal security was reasonable. Such a standard goes against the very grain of the Eighth Amendment. Consistent with this Court's prior decisions, state prison officials must be accorded a broader range of discretion within which to adopt and implement policies and procedures relating to internal prison security. They should not be subjected to liability in damages under § 1983 just because others may feel that the policies and procedures they invoked in a prison riot were less desirable than methods which, in hindsight, arguably could have been used.

(Footnote continued from previous page)

Smith v. Iron County, 692 F.2d 685 (10th Cir. 1982); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980). *See also Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977) ("[t]here must be present 'circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control or dependent upon him' "); *Clemmens v. Greggs*, 509 F.2d 1338 (5th Cir. 1975) ("[t]he essence of punishment is the intentional infliction of penalty or harm upon another. At the very least punishment comprises conduct so grossly negligent that intent may be inferred from its very nature"); *Little v. Walker*, 552 F.2d 193 (7th Cir.) *cert. denied*, 435 U.S. 932 (1977) (unnecessary and wanton infliction of pain violates Eighth Amendment).

This Court should enunciate the appropriate standard to be applied to § 1983 claims based on the Eighth Amendment and arising out of prison riot situations. The Court should grant this petition, issue a writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
MICHAEL D. REYNOLDS
Assistant Attorney General
Counsel for Petitioners

APPENDIX A

Gerald ALBERS, Plaintiff-Appellant,

v.

Harold [*sic*] WHITLEY, et al.,

Defendants-Appellees.

No. 82-3551.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Nov. 10, 1983.

Decided Oct. 1, 1984.

[Names of counsel omitted in printing]

BEFORE: WRIGHT, CANBY and BOOCHEVER, Circuit Judges.

CANBY, Circuit Judge:

Plaintiff Albers appeals from a final judgment entered by the district court upon a directed verdict in favor of defendants. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982). The lower court's ruling was issued following a 3-day jury trial. Albers sought compensatory and punitive damages against defendants pursuant to 42 U.S.C. § 1983, alleging violations of his eighth and fourteenth amendment rights. He also requested damages under the Oregon Tort Claims Act for pendent state claims. We reverse in part the district court's judgment verdict and remand for a new trial. We affirm as to the pendent state claims.

FACTS

Albers was a prisoner whose claims arise from his having been shot in the knee by defendant prison officials while they

were quelling a prison disturbance in "A" Block of the Oregon State Penitentiary on June 27, 1980. Cellblock "A" consists of two tiers and houses more than 200 inmates. The only reasonable mode of access between the two tiers is a connected stairway. The stairway is separated from the lower tier by a barred door. Prison officers may enter the cellblock from either end, on either tier and can control entry into either tier by means of barred walkways. Defendant Whitley was security manager of the penitentiary; defendant Keeney was an assistant superintendent; and defendant Kennecott was a corrections officer.

On the night of June 27, 1980, some inmates in cellblock "A" became agitated about what they viewed as mistreatment of other inmates by prison guards. Because of the ensuing commotion and the inmates' tense mood an early "cell-in" order was given.

Some inmates resisted and one inmate, Richard Klenk, became particularly upset. He confronted two guards and assaulted one. After the assaulted guard left the cellblock, some inmates began to break furniture. The remaining guard was moved to a safer area by several helpful inmates but was kept hostage.

Prison authorities were notified and defendant Whitley went to speak with Klenk. A few attempts were made to demonstrate that the inmates whom the prisoners were originally concerned about were unharmed, but the disturbance continued.

Whitley checked the condition of the prison guard being held hostage and found him unharmed. He then began organizing an assault squad. At some point the prison officials discovered that Klenk had a knife and had claimed that one inmate had been killed and that others would die.

Whitley returned to the cellblock to see that the hostage guard was still unharmed, and was told by other inmates that they would protect the guard. Whitley then spoke with Albers who had left his cell at an inmate's request to see whether he could aid in quieting the disturbance. Albers asked Whitley if he would return with a key to the lower tier cells to allow those on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley said that he would return with the key. When Whitley left, he noticed a barricade had been constructed, limiting access to the cellblock.

The prison officials agreed that their only feasible alternative was to arm a squad with shotguns and invade the cellblock. Cupp ordered the squad to "shoot low."

When Whitley reentered the cellblock he was followed by three armed guards. There is evidence that Albers asked for the key and Whitley screamed "shoot the bastards" and ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage; it was also the only route by which Albers could return to his own cell.

Warning and second shots were fired. Whitley chased Klenk to the upper tier. Albers ran up the stairs behind Whitley and was shot in the knee by Kennecott. Klenk was subdued by Whitley with the help of several inmates. The hostage guard was released unharmed. One other inmate had been shot on the stairs and others on the lower tier also were harmed by gunshot. Albers sustained severe nerve damage to his lower left leg, with residual paralysis, and mental and emotional distress.

The issues on appeal are (1) whether there was evidence from which a jury could conclude that Albers was deprived of any constitutional rights; (2) whether defendants are protected by qualified immunity; and (3) whether Albers' state law claims are barred by the Oregon Tort Claims Act.

DISCUSSION

To establish a prima facie case under section 1983, Albers was required to show (1) that the conduct he complained of was committed by defendants and under color of state law, and (2) that this conduct deprived Albers of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981). There is no question that defendant prison authorities were acting under color of state law. Our focus is therefore upon deprivation of federally protected rights. It is not enough for Albers to show that he may have been the victim of a state-law tort; he must show a violation of the Constitution or a federal statute. *Baker v.*

McCollan, 443 U.S. 137, 142, 99 S.Ct. 2689, 2693, 61 L.Ed.2d 433 (1979).

The right upon which Albers relies is his right under the eighth amendment not to be subjected to cruel and unusual punishment.[1] Punishment has been characterized as cruel and unusual when it is incompatible with "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), and when it involves an unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime. *See Solem v. Helm*, ___ U.S. ___, 103 S.Ct. 3001, 3006, 77 L.Ed.2d 637 (1983); *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S.Ct. 285, 290 50 L.Ed.2d 251 (1976). A formal intent to punish is not required; unjustified striking, beating or infliction of bodily harm upon a prisoner by or with the authorization of state officials may be sufficient to violate the eighth amendment. *See, King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). It is difficult to draw a precise line at which the application of force becomes unconstitutional, but "unnecessary, unreasonable, and grossly" excessive force qualifies. *Williams v. Mussomelli*, 722 F.2d 1130, 1134 (3d Cir. 1983).

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[1] We agree with the district court that Albers is not asserting an independent violation of fourteenth amendment due process. 546 F. Supp. at 732 n. 1. There is consequently no need to consider whether Albers' protections under that clause differ in any way from those under the eighth amendment. *See Williams v. Mussomelli*, 722 F.2d 1130 (3d Cir. 1983).

All of these general standards require adaptation however, to fit the facts of Albers' case. Without question, shooting a prisoner in the knee would qualify as cruel and unusual if it were simply done as punishment for crime or bad behavior. Here, however the shooting occurred in the course of a forcible response to a prison emergency. "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). Moreover, those authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis; a measure that in retrospect appears not to have been necessary might have seemed very necessary to a reasonable prison administration at the time it was taken. *See id*; *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

On the other hand, the latitude accorded to prison authorities does not mean that they are authorized to use any amount of force, however great. *Ridley v. Leavitt*, 631 F.2d 358, 360 (4th Cir. 1980). In our view, a proper standard deems that eighth amendment to have been violated when the force used is "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the

exigency, knew or should have known that it was unnecessary, Albers' constitutional right would have been infringed. Similarly, if the emergency plan was adopted or carried out with "deliberate indifference" to the right of Albers to be free of cruel unusual punishment, when the eighth amendment has been violated. *See, Haygood v. Younger*, 718 F.2d 1472, 1482-83 (9th Cir. 1983), *petition for rehearing en banc granted*, 729 F.2d 613 (9th Cir. 1984); *Miller v. Solem*, 728 F.2d 1020, 1024 (8th Cir. 1984). This "deliberate indifference" standard arose in cases where prisoners were denied proper medical care, and it was designed to differentiate violations of constitutional rights from mere malpractice. *See, Estelle v. Gamble*, 429 U.S. 97, 104-106, 97 S.Ct. 285, 291-292, 50 L.Ed.2d 251 (1976). The standard may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners. *See, Haygood v. Younger*, 718 F.2d at 1482-83; *Miller v. Solem*, 728 F.2d at 1024. So applied, "deliberate indifference" goes well beyond negligence and amounts to the " 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976)).

Albers contends that he presented sufficient evidence to permit a jury to find that unreasonable, disproportionate and unnecessary force was used against him, and that it was used with deliberate indifference to his constitutional right. The district court, referring to uncontradicted evidence that defen-

dants were faced with a prison uprising and that an inmate armed with a knife had threatened to kill a hostage, held that the defendants' actions, even in hindsight, could not be viewed as unreasonable. The court accordingly directed a verdict for defendants. Our review of the record convinces us that the district court erred in so doing.

The district court could properly direct a verdict for defendants only if, after viewing the evidence as a whole and drawing all possible inferences in favor of Albers, it found no substantial evidence that could support a jury verdict in his favor. *California Computer Products, Inc. v. IBM*, 613 F.2d 727, 732-34 (9th Cir. 1979). The district judge was not entitled to resolve contradictions in the evidence, *Autohaus Brugger, Inc. v. SAAB Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.) *cert. denied*, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978), or to pass upon the credibility of witnesses. *Fountila v. Carter*, 571 F.2d 487, 490 (9th Cir. 1978). Those are jury functions.

The record discloses numerous instances of conflicting testimony regarding excessive use of force. While the evidence regarding the threatening behavior of inmate Klenk was uncontradicted, there was testimony that the general disturbance in the cell block [*sic*] was subsiding by the time that the defendants stormed it with shotguns. The jury might have believed that conditions were so improved that it was or should have been apparent to defendants, and have called for less force. *See Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980). Both plaintiff and defendants presented expert testimony on the propriety of the prison authorities' actions

during the prison disturbance. It was the jury's function to weigh the experts' testimony on the basis of each expert's experience, knowledge, and opportunity to observe. *See, Cockrum v. Whitney*, 479 F.2d 84, 86 (9th Cir. 1973).

Albers' expert, Mr. Lou Brewer, testified that the use of deadly force under the circumstances of this case, taking its timing into account, was unnecessary to prevent imminent danger to either the hostage or other inmates. He also testified that the use of deadly force was excessive under the circumstances at the time it was used, and that reasonable corrections policy would dictate that there be a prior verbal warning immediately before shooting. Albers [*sic*] second expert, Mr. Lee Perkins, testified that the prison authorities should have acted differently, and that they were "possibly a little hasty in using firepower" on the inmates.

Although this testimony was controverted by defendants' experts, Mr. W. James Estelle, Jr. and Mr. Roger W. Crist, it is more than possible that a jury could have concluded that the prison officials' "riot plan" was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests. We hold that there was sufficient evidence presented from which a jury applying the proper eighth amendment standard could have found that plaintiff's eighth amendment rights were violated. Consequently, we must reverse the judgment of the district court and remand for

a new trial.

QUALIFIED IMMUNITY

One final note should be taken of the qualified immunity defense claim. Under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. This is an objective standard.

As we noted in *Haygood, supra*, however, there is overlap between our eighth amendment analysis and the qualified immunity defense. A finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See, Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would violate a right "clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

Therefore, a new trial must determine whether Albers was subjected to cruel and unusual punishment under the "deliberate indifference" standard by defendants' use of excessive force against him. If it is determined that the prison

authorities' conduct did not violate this standard, they are absolved of all liability under § 1983. If an eighth amendment violation is found, there is no qualified immunity defense available.

PENDENT STATE CLAIMS

The district court correctly dismissed Albers' pendent state tort claims because recovery is barred by the Oregon Tort Claims Act. *See*, O.R.S. § 30.265(3)(a).

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

EUGENE A. WRIGHT, Circuit Judge, dissenting:

I would affirm substantially for the reasons stated by Judge Panner in his excellent opinion below. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1983). I add these comments. I agree with the district judge that: (1) no constitutional rights were violated by the prison officials' use of deadly force during a prison riot, and (2) the prison officials enjoy immunity to Albers' claim for damages.

I. *The Eighth Amendment Claim*

This is the first case in which a federal court has countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance. It is not our function to second guess the prison officials' response to a riot situation. Administration of a prison is "at best an extraordinarily difficult undertaking." *Hudson v. Palmer*, ___U.S. ___, ___, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984); *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974).

The district court viewed the evidence correctly in the light most favorable to the plaintiff and concluded that no triable issue existed because the prison officials responded in good faith to a genuine emergency. *Albers v. Whitley*, 546 F. Supp. 726, 735 (D. Or. 1982) This was a riot. Prisoners were armed with a knife and pieces of furniture. A guard was held hostage. One inmate was reported dead.

Prison officials attempted and failed to achieve a peaceful settlement. They elected not to use tear gas because of the great discomfort it would cause the majority of inmates who had obeyed the cell-in order. *Albers*, 546 F. Supp at 733-34.

Close judicial scrutiny is inappropriate where prison officials react in good faith to a true crisis. *Arroyo v. Schaefer*, 548 F.2d 47, 50 (2d Cir. 1977); *LaBatt v. Twomey*, 513 F.2d 641, 647 (7th Cir. 1975). *See also Pepperling v. Crist*, 678 F.2d 787, 789 (9th Cir. 1982) (extreme deference given to prison officials in matters of internal security). Judge Friendly has observed, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).

II. *Qualified Immunity*

Under *Davis v. Scherer*, ___U.S. ___, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), prison officials enjoy immunity unless, at the time Albers was shot, it was "clearly established" that prison officials could be held liable for using deadly force in quelling a prison riot. The standard is objective and is appropriate for summary disposition by a trial judge. *Harlow v.*

Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). We view the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." *Davis*, ___ U.S. at ___, 104 S.Ct. at 3018 (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct at 2738).

The majority, however, merges the question of "deliberate indifference" with the question whether a right is "clearly established" for qualified immunity purposes. This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law for the judge, to a question of fact for the jury.

There is no definitive guide as to when a right is "clearly established." *Zweibon v. Mitchell*, 720 F.2d 162, 168-69 (D.C. Cir. 1983). The Supreme Court has indicated that a high standard should be applied in prison cases such as this. In *Davis*, the Court recognized that prison officials routinely make close decisions and that they "should not err always on the side of caution." *Davis*, ___ U.S. at ___, 104 S.Ct. at 3021. Those persons "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." *Id.*

No court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled. These rights are not "clearly established" under *Davis*.

The majority's approach is not compelled by *Haygood v. Younger*, 718 F.2d 1472, 1483-84 (9th Cir. 1983), *vacated*, 729 F.2d 613 (9th Cir. 1984). A vacated decision has no vitality as precedent. *See, Hill v. Western Electric Co., Inc.* 672 F.2d 381, 387 (4th Cir. 1982); *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982).

I would affirm.

APPENDIX B

Gerald ALBERS, Plaintiff,

v.

Harol WHITLEY, et al., Defendants.

Civ. A. No. 81-517-PA.

United States District Court,

D. Oregon.

Aug. 31, 1982.

[Names of counsel omitted in printing]

OPINION

PANNER, District Judge.

This is a civil rights action against individual corrections officers arising out of a disturbance in "A" Block of the Oregon State Penitentiary on June 27, 1980. Plaintiff was injured by shotgun fire. He alleged that he was deprived of rights under the eighth and fourteenth amendments. Additionally, he appended state tort claims for assault and battery and negligence.

At the conclusion of a jury trial, I directed a verdict for the defendants. I ruled that there was not sufficient evidence presented from which a jury could conclude that plaintiff was deprived of any constitutional rights. Alternatively, I ruled that the defendants were immune from damages. I rejected plaintiff's pendent claims. Entry of judgment has been withheld pending this opinion.

STANDARDS FOR DIRECTED VERDICT

A directed verdict is appropriate if the evidence permits only one reasonable conclusion as to the verdict. *California Computer Products v. I.B.M.*, 613 F.2d 727, 732-33 (9th Cir. 1979). To reach such a conclusion, I must consider all the evidence but must do so in a light most favorable to the nonmovant. *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 909 (9th Cir.), *cert. denied*, 436 U.S. 946, 98 S.Ct. 2848, 56 L.Ed.2d 787 (1978). I cannot weigh the evidence presented nor consider the credibility of witnesses. All reasonable inferences must be drawn in favor of the nonmovant. *Fountila v. Carter*, 571 F.2d 487, 490 (9th Cir. 1978); *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370, 1372 (9th Cir. 1977). Finally, I note this circuit's admonition that a motion for directed verdict should be granted only "where there is no substantial (or 'believable') evidence to support" any other verdict. *Autohaus Brugger*, *supra* at 910.

FACTS

Plaintiff Gerald Albers was an inmate housed in cellblock "A" at the Oregon State Penitentiary in Salem, Oregon on June 27, 1980. Defendant Whitley was security manager of the penitentiary; defendant Cupp was superintendent; defendant Keeney was an assistant superintendent; and defendant Kennecott was a corrections officer.

Cellblock "A" is an "honor" cell consisting of two tiers and housing for over 200 inmates. Lower tier cells are adjacent to an open area. A stairway leads to the upper tier. A hallway off

the open area leads out of the cellblock. The lower tier cells are separated from the open area by floor-to-ceiling bars and a barred door. On each tier are two opposing rows of cells. Open floor separates the lower tier rows of cells. Open space separates the rows on the upper tier. While it is possible to jump and climb between tiers, the stairway offers the only practicable way for inmates to reach the upper tier. Prison officers may enter cellblock "A" from either end, on either tier and can control entry into either tier by means of barred walkways.

Inmates housed in cellblock "A" have good disciplinary records and accordingly, enjoy certain privileges that are denied the rest of the prison population. Significantly, cellblock "A" inmates are allowed more time outside their cells. Normal "cell-in" time for cellblock "A" is 11:00 p.m. on weekdays and midnight on weekends.

On Friday night, June 27, 1980, several cellblock "A" inmates became upset over perceived mistreatment of other inmates who were being escorted by guards to the prison's segregation and isolation building. Some inmates verbally expressed their agitation believing there was unnecessary force used by the guards in escorting the prisoners.

Corrections officers Fitts and Kemper were on duty in cellblock "A" on June 27, 1980. At approximately 9:15 p.m., Officer Kemper received a call. He was instructed to order all inmates in cellblock "A" to return to their cells. This cell-in order was apparently due to the commotion and tense mood of the inmates. Accordingly, Kemper issued the order for all

inmates to return to their cells. At that time, he was standing in the open area adjacent to the lower tier. Fitts was nearby. Plaintiff was in his upper tier cell #274.

The cell-in order was met with resistance. Several inmates demanded to know the reason for the order. One inmate, Richard Klenk, became particularly upset. Klenk jumped from the second tier and confronted and assaulted Kemper. Kemper left the cellblock but Fitts remained. Shortly after Kemper left, Klenk and other inmates began to break furniture. Two inmates escorted Fitts from the open area into an office, stating that Fitts would be protected from harm there.

Kemper informed the control center of the disturbance in cellblock "A". Defendants Cupp and Kenny [*sic*] were immediately notified and both proceeded to the penitentiary. Defendant Whitley was also advised of the disturbance and went to cellblock "A".

Whitley entered cellblock "A", climbing over broken furniture placed by inmates in the hallway leading into the cellblock. Whitley spoke with inmate Klenk. Whitley agreed to allow four inmates to be escorted to the segregation and isolation building to observe the condition of the inmates who were taken there earlier. Whitley left cellblock "A" with those four inmates. The four later reported back to fellow inmates in cellblock "A" that the prisoners in segregation and isolation were not harmed but were intoxicated. This information did not quell the disturbance.

Whitley returned to the cellblock and asked Klenk to allow him to see Officer Fitts. Klenk brought Fitts to Whitley who observed that Fitts was not harmed. Fitts was returned to the office but shortly thereafter was taken to cell #201 on the upper tier.

Meanwhile, Whitley left the cellblock and began organizing an assault squad. At some point, Whitley and others were aware that Klenk had secured a homemade knife. Klenk had also informed Whitley that one inmate had been killed and that others would die.

Whitley returned to the cellblock for a third time. Klenk repeated his earlier demand to meet with media representatives. Whitley again requested to see Fitts. Klenk escorted Whitley to cell #201. Fitts reported that he was unharmed. Several inmates in and around cell #201 stated to Whitley that they would protect Fitts from physical harm. Whitley left the cellblock, noting that a barricade had been constructed that limited access into the cellblock.

Whitley advised defendants Kenney and Cupp of the events and his assessment of the situation. It was agreed that tear gas could not be utilized. Cupp thereupon ordered Whitley to take a squad into "A" block armed with shotguns. Cupp ordered that the squad be instructed to "shoot low."

During these events, plaintiff left his cell on the second tier. While this was in violation of the "cell-in" order, there was evidence that plaintiff was requested by other inmates to

leave his cell and aid in quelling the disturbance. Plaintiff proceeded down the stairs from the upper tier to the open area in front of the lower tier cells. Although a disputed fact, I accept for purposes of analyzing the evidence, that the steel-barred door which provides access from the lower tier to the open area was closed and locked. I also accept as true, plaintiff's statement that he spoke with Whitley shortly after Whitley spoke with Fitts in cell #201. Plaintiff asked Whitley whether the locked door on the lower tier could be opened to allow inmates, including several elderly inmates, to leave that area until the commotion died down. Whitley responded that he would find out and return with the key.

By this point, the assault group had assembled outside the barricaded entry way. Shotguns had been assigned to Kennecott and Officers Jackson and Smith. Acting under Cupp's orders, the guns were loaded with #6 shot. A second group of officers, without firearms, were assigned to immediately follow the assault group across the barricade. Whitley instructed Kennecott to follow him across the barricade and to fire a warning shot on entry and to shoot low at anyone heading up the stairs toward #201. At about 10:30 p.m., Whitley entered the cellblock, unarmed, followed by Kennecott, Jackson and Smith, all armed with shotguns.

Plaintiff was waiting at the bottom of the stairway for Whitley to return with the key. When Whitley did return, plaintiff asked about the key. The events that followed are in dispute. Viewed in a light most favorable to plaintiff, there was evidence that Whitley screamed "shoot these bastards"

and began running toward the stairs in pursuit of inmate Klenk, without ordering plaintiff to return to his cell. While some lights were broken, there was evidence that the area was sufficiently lighted to enable plaintiff to be recognized and distinguished from other inmates.

Kennecott followed Whitley over the barricade and discharged a warning shot into the wall opposite the cellblock entrance. Once over the barricade, Kennecott discharged a second shot which struck a post near the stairway.

Meanwhile, Whitley had chased Klenk up the stairs toward cell #201. At the doorway to cell #201, Whitley caught and, with the aid of several inmates, subdued Klenk. Concurrently, plaintiff began running up the stairs behind Whitley. Kennecott fired a third shot which struck plaintiff in his knee. After being shot, plaintiff crawled up the stairs and sought shelter in a mop room at the top of the stairs. After Officer Fitts was released unharmed, corrections personnel began to care for the wounded inmates. In addition to plaintiff, another inmate was injured by gunshot on the stairs. Other inmates on the lower tier were also struck by gunshot.

Plaintiff does not claim that his medical care was inadequate. It is, therefore, not detailed. Plaintiff sustained severe nerve damage to his lower left leg, with residual paralysis, and

mental and emotional distress.

ISSUES

1. Was there evidence from which a jury could conclude that plaintiff was deprived of any rights, privileges, or immunities secured by the Constitution?

2. Alternatively, are defendants immune from money damages? and

3. Was there evidence from which a jury could conclude that defendants are liable for assault and battery and negligence under state law?

DISCUSSION

I. CONSTITUTIONAL RIGHTS.

Lawful imprisonment necessarily limits individual rights and privileges. *Price v. Johnson*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). By the very nature of confinement, a prisoner is deprived of certain liberties. Nevertheless, convicts do not forfeit all constitutional protections. *Bell v. Wolfish*, 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979). "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974).

Section 1983 provides a civil remedy for alleged constitutional deprivations. To establish a prima facie case, plaintiff need only prove that the conduct was committed by a person acting under color of state law, and that the conduct in question deprived plaintiff of rights secured by the Constitution. It is not necessary to allege or prove the defendants'

state of mind. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

All defendants were acting under color of state law. Plaintiff's proof was therefore limited to the issue of whether defendants' conduct deprived him of any rights secured by the Constitution.

Based upon the events of the night of June 27, 1980, plaintiff argues that defendants violated his constitutional rights guaranteed by the eighth and fourteenth amendments.[1] Underlying that claim is plaintiff's theory that defendants used unreasonable, excessive force under the circumstances. While plaintiff does not question defendants'

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[1] I do not understand plaintiff to assert an independent violation of fourteenth amendment due process. To prevail on such a theory, plaintiff must prove that he was divested of a protected interest without the due process of law. While plaintiff undoubtedly had liberty and life interest at stake, it is unclear what process was due him. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

The right to be free from infliction of harm without due process as guaranteed by the fourteenth amendment usually applies to pretrial detainees. *E.g., Arroyo v. Schaefer*, 548 F.2d 47, 49-50 (2d Cir. 1977). In limited instances, a regulation or statute may create a due process interest enforceable by a prisoner. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Here, no regulation or statute was cited which would give plaintiff an expectation of a due process hearing prior to the alleged deprivation of liberty. *See Hayward v. Procunier*, 629 F.2d 599, 601 (9th Cir. 1980), *cert. denied*, 451 U.S. 937, 101 S.Ct. 2015, 68 L.Ed.2d 323 (1981). Furthermore, in the midst of the emergency created by riotous inmates holding a guard hostage, the Constitution simply does not mandate a due process hearing for each inmate potentially affected by remedial action. *Hayward, supra* at 602-03 (no due process right to hearing prior to lockdown of prison). When prison authorities are reacting to emergency situations in an effort to preserve the safety and integrity of the institution, the state's interest in decisive action clearly outweighs the inmates' interest in a prior procedural safeguard. *La Batt v. Twomey*, 513 F.2d 641, 645 (7th Cir. 1975).

responsibilities to quell inmate disturbances and to rescue hostages, plaintiff argues that action short of deadly force should have been used. Plaintiff argues, therefore, that defendants' use of deadly force deprived him of rights secured by the Constitution.

The unjustified striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under § 1983. *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980). The eighth amendment, applicable to the states through the fourteenth amendment, prohibits the infliction of cruel and unusual punishment. *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Intent to punish a prisoner is not a necessary component of an eighth amendment claim under § 1983. *Spain v. Procunier*, 600 F.2d 189, 197 (9th Cir. 1979); *Haygood v. Younger*, 527 F. Supp 808, 820 (E.D. Cal. 1981). What is required in a § 1983 action based on the eighth amendment is that the defendants caused harm upon the plaintiff that was cruel and unusual.

While the use of excessive force may give rise to liability under § 1983, the statute cannot be interpreted to impose liability for breach of duties of care arising out of tort law. *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979). "[N]ot every instance of the use of excessive force gives rise to a cause of action under § 1983 merely because it gives rise to a cause of action under state tort law or is prosecutable under criminal assault and battery law." *King v. Blankenship, supra*, 636 F.2d at 73. To be

actionable under § 1983, the alleged excessive use of force must rise to "constitutional dimensions." *Pritchard v. Perry*, 508 F.2d 423, 426 (4th Cir. 1975). *See also, Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *Miller v. Hawver*, 474 F. Supp. 441 (D. Colo. 1979). As Judge Friendly observed in *Johnson v. Glick, supra*, 481 F.2d at 1033, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."

In determining whether this constitutional line has been crossed in this case, I must examine such factors as the need for application of force, the relationship between the need and amount of force that was used, and the extent of the injury inflicted. *Johnson v. Glick, supra*, 481 F.2d at 1033. In applying these factors, I bear in mind that the defendants here are not charged with a pattern of practice of conditions usually associated with eighth amendment violation. Here, the cause of action arose from a single, isolated incident, not likely to be repeated. Under those circumstances, courts have shown a general relunctance to judge the actions of jailers in hindsight. *E.g., La Batt v. Twomey*, 513 F.2d 641, 647 (7th Cir. 1975) (institutional lockdown); *Miller v. Hawver*, 474 F. Supp 441, 442-43 (D. Colo. 1979) (physical attack by guards); *Arroyo v. Schaefer*, 548 F.2d 47, 50 (2d Cir. 1977) (tear gas injury); *see also, Cattan v. City of New York*, 523 F. Supp. 598, 600-01 (S.D. N.Y. 1981) (excessive force by police officers). Nevertheless, emergency conditions do not excuse irresponsibility. The infliction of harm to a prisoner may be cruel and unusual even

when applied in pursuit of legitimate objectives, if it goes beyond what is necessary to achieve those objectives. *Ridley v. Leavitt*, 631 F.2d 358, 390 (4th Cir. 1980); *Suits v. Lynch*, 437 F. Supp. 38, 40 (D. Kan. 1977).

Here, the uncontradicted evidence is that defendants were faced with a riot situation. At least one inmate was armed with a knife. Others were armed with pieces of furniture. One inmate was reported dead and others were said by Klenk to be in danger. Inmates had destroyed much of the cellblock furniture and had constructed a barricade. One guard was held hostage and although there is evidence to show that for the most part he was in the hands of sympathetic inmates, there was uncontradicted evidence that the armed inmate threatened to kill the hostage. In response to this situation, defendants utilized deadly force and inflicted upon plaintiff a serious injury.

Prison officials must be free to deal firmly with outbreaks and uncontrolled situations. They must maintain order, discipline and preserve the security of inmates and guards. *Suits v. Lynch*, *supra*, 437 F. Supp. at 40. Jailers are not obliged to await large-scale violence or repeated assaults on inmates or guards before taking action. Indeed, prison officials would be derelict if, after receiving warning of violent action, they waited fulfillment of the threat before responding. *Olgin v. Darnell*, 664 F.2d 107, 109 (5th Cir. 1981). In the setting of a prison emergency such as an inmate riot, where certain remedial measures are necessary, prison officials must, within their discretion, curtail certain rights of prisoners. *Blair v. Finkbeiner*, 402 F. Supp. 1092, 1094-95 (N.D. Ill. 1975). Of

course, while prison officers are to be afforded broad discretion in maintaining order within the prison walls, the discretion is not unlimited. Only reasonable force under the circumstances may lawfully be employed. *Ridley v. Leavitt*, 631 F.2d 358, 360 (4th Cir. 1980); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980).

Defendants reasonably exhausted attempts to quell the riot through nonforceful means. Three times defendant Whitley entered the cellblock to attempt to calm inmates, disarm inmate Klenk, and to restore order. While there is evidence, viewed in a light most favored to plaintiff, that the general disturbance was subsiding, Whitley's attempt at nonforceful resolution failed. The hostage remained. Klenk had also claimed to have killed one inmate and threatened others. Under these circumstances, I hold that the use of force to quell the riot, rescue the threatened hostage, and restore order to cellblock "A" was reasonable, necessary and proper. No reasonable jury would have concluded otherwise. An issue remains, however, whether the use of deadly force was reasonably proportional to the need for force.

My research disclosed no reported decisions in which an inmate, shot by guards during the quelling of a prison riot, sought damages for alleged violations of constitutional rights. While such shootings have occurred, *e.g.*, *Inmates of Attica v. Rockefeller*, 453 F.2d 12, 15 (2d Cir. 1971), apparently no civil suits were filed.

In *LeBlanc v. Foti*, 487 F. Supp. 272, 275-76 (E.D. La. 1980), the court assumed for purposes of analysis that plaintiff was maced by prison guards when a disturbance broke out

among inmates. The court held that the use of mace by prison guards to quell the disturbance was not unreasonable force under the circumstances. *Accord*, *Clemmons v. Greggs*, 509 F.2d 1338, 1340 (5th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 360, 46 L.Ed.2d 280 (1975) (use of tear gas to prevent escape held to be reasonable); *Davis v. United States*, 439 F.2d 1118, 1119-20 (8th Cir. 1971) (use of tear gas to quell riot was reasonable).

Here, a decision was made by the defendants not to use tear gas or mace. There was concern whether prison officials could maneuver through the barricade and adminster the gas quickly enough to assure that no harm came to the hostage. There was also concern whether gas would have the necessary effect in the relatively large area of cellblock "A". Gas would cause great discomfort to the majority of inmates who had obeyed the cell-in order and were in their cells. These concerns were reinforced by expert testimony by both sides at trial.

The decision to use deadly force was made after failure of nonforceful settlement and after rejection by officials of the use of gas. The gunshots were loaded with #6 shot which consists of quite small pellets. Instructions were given to shoot low anyone who followed Whitley up the stairs toward cell #201.

Viewing the evidence in favor of plaintiff, the prison officials knew that inmates who had disobeyed the cell-in order might be injured by the shooting. Nevertheless, interests of prisoners must be balanced against those of the prison

institution. *Blair v. Finkbeiner*, *supra*, 402 F. Supp. at 1095. Where prison authorities react to emergency situations and determine that immediate action is necessary to forestall a riot, that determination outweighs the interest of accurately assessing individual culpability before taking precautionary steps. *La Batt v. Twomey*, *supra*, 513 F.2d at 645.

Defendants here were faced with a situation that had extreme potential danger to a hostage guard and to inmates. Possible alternatives to force were reasonably considered and rejected. While plaintiff's experts suggested possible riot formations, tear gas, and sharpshooter alternatives, it would be speculative to conclude that such other alternatives would have been more effective in securing the release of the hostage and the safety of the inmates. The safety of the hostage and the nonrioting inmates was of paramount importance to the defendants.

Prison officers' choice of alternatives available to them in emergency situations must not be unduly hindered by overboard judicial scrutiny, especially on the basis of hindsight. *La Batt v. Twomey*, *supra*, 513 F.2d at 647. Although factually distinguishable, *La Batt*, is highly instructive on the proper degree of judicial review of prison officials' decision-making during emergency situations:

> 'We recognize that present or impending disturbances which might overtax the control capacity of a prison creates a dominant interest in prison authorities being able to act without delay if they feel that delay would endanger the inmate, others, or the prison community. [Citations omitted.] This is so even though the assessment of difficulties may subsequently prove to

> be unfounded . . ." [Citations omitted.] The psychology and social stability of a prison community are foreign to one who is not involved with it on a day-to-day basis. Any attempt to reconstruct, at a later date, the conditions present at the time of dispute, and the dangers then feared by prison authorities, is fraught with perils of misunderstanding and misapprehension.
>
> Accordingly, the standard of review of a challenge to the sufficiency of the basis of emergency response must be generous to the administration. We conclude that, absent a claim of bad faith or mere pretext on the part of prison authorities in the imposition of emergency procedures, the underlying bases of decision must be deemed to lie fully within their expertise and discretion and, accordingly, is insulated from subsequent judicial review.

La Batt, *supra*, 513 F.2d at 647.

Viewing the evidence in a light most favorable to the plaintiff, I hold that defendants' use of deadly force was justified under the unique circumstances of this case. Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that defendants' actions were not reasonably necessary.

Accordingly, applying the factors enumerated in *Johnson v. Glick*, *supra*, 481 F.2d at 1033, I hold that under the circumstances of this case, plaintiff's claims of excessive force do not rise to that "constitutional dimension" sufficient to support a cause of action under § 1983.

II. QUALIFIED IMMUNITY.

Prison officials enjoy a qualified immunity from damages in § 1983 actions. *Procunier v. Navarette*, 434 U.S. 555, 561-62, 98 S.Ct. 855, 859-60, 55 L.Ed.2d 24 (1978). Defendants bear the burden of pleading and proving their entitlement to qualified immunity. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980) (pleading); *Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981) (proving). Such immunity is necessary to insulate public officers from vexatious litigation and to allow public officers to take prompt action based on information provided to them by their parties. *Scheuer v. Rhodes*, 416 U.S. 232, 246, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974) (state governors); *Wood v. Strickland*, 420 U.S. 308, 319, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975) (school board members). These factors become particularly relevant for prison officers who must exercise an exceedingly broad range of discretion in performing official duties. *Douthit v. Jones*, 619 F.2d 527, 534 (5th Cir. 1980) (dictum).

There is often confusion between a plaintiff's prima facie case and defendants' affirmative defense of qualified immunity. This is because the evidence the plaintiff is required to produce to establish a prima facie case is precisely the type of evidence that makes the defendants' immunity less likely. *Gullatte v. Potts*, 654 F.2d 1007, 1014-15 (5th Cir. 1981). It is not unusual for courts to "skip" over the constitutional claims and consider the immunity issue since a finding of qualified immunity moots the effect of the constitutional violation. *E.g.*, *Procunier v. Navarette*, *supra*; *Baker v. Nor-*

man, 651 F.2d 1107, 1124 (5th Cir. 1981)). While I hold that defendants did not deprive plaintiff of any constitutional rights, I find it appropriate to analyze defendants' affirmative defense of qualified immunity. I hold as an alternative grounds in support of the directed verdict that defendants are immune from damages.

Under the qualified immunity doctrine, a public officer performing acts in the course of official conduct is insulated from damage suits if (1) at the time and in light of circumstances there existed reasonable grounds for the belief that the action was appropriate; and (2) the officer acted in good faith. *Harris v. City of Roseburg, supra*, 664 F.2d at 1128. Courts have determined that this two-prong analysis calls for both an objective and subjective evaluation of official conduct. *E.g., Williams v. Treen*, 671 F.2d 892, 896 (5th Cir. 1982); *Gullatte v. Potts, supra*, 654 F.2d at 1012-14; *Harris v. City of Roseburg, supra*, 664 F.2d at 1127-28; *Lock v. Jenkins*, 641 F.2d 488, 499-500 (7th Cir. 1981). *See also, Wood v. Strickland, supra*, 420 U.S. at 321-22, 95 S.Ct. at 1000-01; *Procenier v. Nararette, supra*, 434 U.S. at 562-66, 94 S.Ct. at 859-62. Under the subjective test, an official forfeits his immunity when he acts with malicious intent to cause a deprivation of constitutional rights. *Williams v. Treen, supra*, 671 F.2d at 896. An official must prove that "he was acting sincerely and with the belief that he was doing right, not knowing that his official action would violate [plaintiff's] constitutional rights . . . ." *Harris v. City of Roseburg, supra* 664 F.2d at 1128. Under the objective standard an official,

even if acting in the sincere subjective belief that actions taken are right, loses the cloak of qualified immunity if the actions taken contravene settled, indisputable law. *Williams v. Treen, supra*, 671 F.2d at 896. Defendants must show that they should not have reasonably known that their official actions would violate plaintiff's constitutional rights. *Harris v. City of Roseburg, supra*, 664 F.2d at 1128.

The Supeme Court recently re-examined the qualified or "good faith" immunity defense. In *Harlow & Butterfield v. Fitzgerald*, ___U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court reviewed the traditional "objective" and "subjective" standards and greatly limited the use of the subjective analysis. Relying on its past decisions in *Procunier v. Navarette, supra*, 434 U.S. at 565, 94 S.Ct. at 861 and *Wood v. Strickland, supra*, 420 U.S. at 321, 95 S.Ct. at 1000, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow, supra*, 102 S.Ct. at 2738. The Court concluded that judicial inquiry into subjective motivation was particularly disruptive of effective government and prevented the pretrial resolution of many insubstantial claims. *Id.*

The Court thus defined the limits of qualified immunity essentially in objective terms, concluding that such a limitation would adequately safeguard individual statutory and constitutional rights. "Where an official could be expected to

know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action 'taken with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 [87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288] (1967)" (footnote omitted). *Harlow*, *supra*, 102 S.Ct. at 2739.

Applying these standards to the facts of this case, I hold that defendants are immune from damages. Defendants are liable only if they actually knew or should have known that their action violated plaintiff's constitutional rights. *Harlow*, *supra*, 102 S.Ct. at 2739; *Sequin v. Eide*, 645 F.2d 804, 812 (9th Cir. 1981). Only a reasonable belief is necessary since officials cannot be expected to predict the course of constitutional law upon which federal judges often differ. *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d Cir. 1972) (Lumbard, J., concurring).

The issue of qualified immunity is generally a question for the jury. *Beard v. Udall*, 648 F.2d 1264, 1272 (9th Cir. 1981). Nevertheless, if the evidence permits only one reasonable conclusion, a directed verdict is appropriate. Here, there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage. While injuries had undoubtedly occurred under similar circumstances no

reported cases established the right of a prisoner to recover damages for the alleged constitutional violation. In contrast, case authority at the time of this incident clearly provided great discretion to prison officials to take necessary action to maintain and control prison situations.[2]

I hold that defendants could not have reasonably known that actions taken to quell the disturbance and rescue the hostage would violate any prisoner's constitutional rights. Therefore, applying the objective test mandated by *Harlow*, *supra*, I hold that defendants are entitled to a qualified immunity from damages. No reasonable jury would conclude otherwise.

III. PENDENT CLAIMS.

A. *Jurisdiction.*

Federal courts may exercise jurisdiction over pendent state claims that arise from "a common nucleus of operative facts." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). When federal claims are dismissed prior to trial, pendent state claims with few exceptions must also fail. *Gibbs*, *supra* at 726, 86 S.Ct. at 1139; *Wren v. Sletten Construction Co.*, 654 F.2d 529, 536 (9th Cir.

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[2] *E.g.*, *Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977); *La Batt v. Twomey*, 513 F.2d 641 (7th Cir. 1975); *Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 360, 46 L.Ed.2d 280 (1975); *Pritchard v. Perry*, 508 F.2d 423 (4th Cir. 1975); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973); *Davis v. United States*, 439 F.2d 1118 (8th Cir. 1971; *LaBlanc v. Foti*, 487 F. Supp. 272 (E.D. La. 1980); *Miller v. Hawver*, 474 F. Supp. 441 (D. Colo. 1979); *Suits v. Lynch*, 437 F. Supp. 38 (D. Kan. 1977); *Blair v. Finkbeiner*, 402 F. Supp. 1092 (N.D. Ill. 1975). *See generally*, discussion in Section I, *supra*.

1981). Nonetheless, it is not necessary to have continual jurisdiction over federal claims as a prerequisite to resolution of pendent claims. *Meyer v. California and Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981). Where there has been a trial of the operative facts underlying both federal and state claims, a "decent regard for economical and sensible use of the state and federal judicial machinery and considerations of expense to the litigants" requires a court to decide the pendent claims even though the federal ones fail. *McLearn v. Cowen & Co.*, 660 F.2d 845, 848 (2d Cir. 1981) (dictum). Once a trial is held, dismissal of the pendent claims should be made only if the federal cause of action was so insubstantial and devoid of merit that there is obviously no federal jurisdiction. *Traver v. Meshriy*, 627 F.2d 934, 939 (9th Cir. 1980).

I hold that the federal claims in this case were not frivolous nor insubstantial. While the federal claims ultimately were not meritorious, they were sufficient to confer jurisdiction. Accordingly, I exercise my discretion to reach the merits of the pendent state claims. *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970).

B. *Merits*

Plaintiff asserted two pendent state claims. First, plaintiff alleged that defendants were negligent. To state a cause of action in negligence under Oregon law, plaintiff must allege that defendants owed a duty, that defendant breached that duty, and that the breach was the cause in fact of some legally cognizable damage to plaintiff. *Brennan v. City of Eugene*, 285

Or. 401, 405, 591 P.2d 719, 722 (1979). Second, plaintiff alleged that defendants committed an assault and battery. Under Oregon law, assault is an intentional attempt to do violence to another person. *Cook v. Kinzua Pine Mills Company*, 207 Or. 34, 47, 293 P.2d 717, 723 (1956). Battery is the voluntary act which causes intentionally harmful or offensive contact with another. *Baker v. Baza'r, Inc.*, 275 Or. 245, 249, 551 P.2d 1269, 1271 (1969).

Even assuming that plaintiff can prove the necessary elements to recovery for these alleged tort claims, I hold that recovery is barred by the Oregon Tort Claims Act. Or. Rev. Stat. § 30.265(3)(e) provides that every public body and its officers acting within the scope of their employment are immune from the liability for any claims arising out of riots, civil commotion or mob actions. The immunity further extends to any act or omission in connection with the prevention of riots.

Plaintiff argues that the statute provides only government immunity and not employee immunity. Plaintiff contends that Or. Rev. Stat. § 30.265 applies only to the financial liability of the state for actions taken by the public bodies and by their employees as officials within the scope of their employment. Thus, immunity would not extend to employees who are sued as individuals based on personal, tortious conduct.

Or. Rev. Stat. § 30.265(3) does not bar suit against state officers who commit torts while acting outside the scope of their employment or duties. *Dickens v. DeBolt*, 288 Or. 3,

10-12, 602 P.2d 246, 250-51 (1979) (police officer not immune for acts taken outside scope of employment). Nonetheless, that exception does not apply here. Plaintiff specifically alleges that defendants acted by virtue of their vested authority and in their official capacities. There was no evidence to the contrary.

Plaintiff argues that no recovery is sought against the public body. Under the Oregon Tort Claims Act, the public body is liable for the torts of its employees acting within the scope of their employment. Or. Rev. Stat. § 30.265(1). The public body has an obligation to defend its employees in such civil actions and, if necessary, to indemnify them. *Id.* Here, the state legislature chose not to waive immuity for officers acting within the scope of their employment for claims arising out of a riot.

Plaintiff's remaining arguments against the application of immunity are considered and rejected.[3] Accordingly, plain-

[3] Plaintiff argues that the affirmative defense of immunity was not properly raised. I find, however, that the Answer alleges as a "Third Affirmative Answer and Defense" that defendants are immune from liability as a matter of law. Plaintiff also argues that application of Or. Rev. Stat. § 30.265(3)(e) to bar employee liability violates the due process provision of the Oregon Constitution. Oregon Constitution, Art. I, Section 10. That section provides that ". . . every man shall have remedy by due course of law for injury done to him and his person, property or reputation."

Article I, Section 10 of the Oregon Constitution was historically directed against denying a remedy for a legal injury to private interest recognized under the common law of torts or property. *American Can Co. v. Oregon Liquor Control Commission*, 15 Or.App. 618, 647, 517 P.2d 691, 705 (1973). Here, plaintiff argues that barring recovery from public employees for actions which, if performed by private individuals might very well be actionable, is a denial of due process under the Oregon Constitution.

The disparate treatment between private and public tortfeasors provided by the Oregon Tort Claims Act has been the subject of prior

(Footnote continued on next page)

tiff's pendent claims for negligence and assault and battery are dismissed.

CONCLUSION

It is unfortunate that an inmate was injured by prison officials attempting to quell a riot and rescue a host-

(Footnote continued from previous page)

constitutional challenge. *E.g., Webb v. Highway Div., et al.*, 56 Or.App. 323, 328, 641 P.2d 1158, 1161 (1982) (equal protection and due process challenge to disparate notice requirements rejected); *Riddle v. Cain*, 54 Or.App. 474, 478-79, 635 P.2d 394, 396, *pet. for review denied*, 292 Or. 334, 644 P.2d 1127 (Or. 1981) (due process challenge to notice requirement rejected); *Brown v. Portland School District #1*, 48 Or.App. 571, 576, 617 P.2d 665, 668 (1980), *rev. on other grounds* 291 Or. 77, 628 P.2d 1183 (1981) (equal protection challenge to notice requirement rejected); and *Edwards v. State, Military Department*, 8 Or.App. 620, 623-25, 494 P.2d 891, 893-94 (1972) (equal protection challenge to immunity for liability of tort claims covered by Workmen's Compensation Law rejected).

Here, although the constitutional challenge differs from the above cases, it must nevertheless be rejected. The purpose of Article I, Section 10 due process provision is "to save from legislative abolishment those jural rights which had become well established prior to the enactment of our Constitution." *Stewart v. Houk*, 127 Or. 589, 591, 271 P. 998, 999 (1928) (invalidating Oregon's first automobile guest statute). Prior to enactment of the Tort Claims Act in 1967, public bodies were immune from all tort liability. *E.g., Bacon v. Harris*, 221 Or. 553, 352 P.2d 472 (1972). Additionally, employees were immune from tort liabi rising from the performance of "discretionary functions." *Jarrett v. . .s*, 235 Or. 51, 54-55, 383 P.2d 995, 997 (1963). By passage of the Oregon Tort Claims Act, the legislature waived immunity with enumerated exceptions. No remedy was abolished. On the contrary, the Act provides redress of grievance which did not before exist. The due process protection of Article I, Section 10 is not proscribed. *See Noonan v. City of Portland*, 161 Or. 213, 88 P.2d 808 (1938) (due process provision does not invalidate an exemption clause in city charter that withholds remedy against city); *Gearin v. Marion County*, 110 Or. 390, 223 P. 929 (1924) (due process provision has no application to a case involving immunity of state or subordinate agency).

age Viewing the evidence in the light most favorable to the plaintiff, however, I hold that plaintiff's civil rights claims must fail. The use of deadly force was justified under the unique circumstances of this case. Alternatively, I hold that defendants have a qualified immunity from damages. Similarly, defendants are immune from liability as to the pendent state claim.

Accordingly, the clerk is directed to enter judgment in favor of defendants.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. Pro. 52(a).

ORIGINAL

No. 84-1077

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

HAROL WHITLEY, et.al.,
Petitioners,

v.

GERALD ALBERS,
Respondent

Respondent's Brief in Opposition to
Petition for a Writ of Certiorari

GENE B. MECHANIC
GOLDBERG & MECHANIC
808 S.W. Alder, Suite 200
Portland, Oregon 97205
Phone: (503)224-2372
Counsel for Respondent

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STATEMENT OF THE CASE

Petitioner's summary of the facts and procedural history is for the most part accurate. However, there are some misstatements and omissions which are noteworthy.

First, contrary to the thrust of petitioner's brief, this case involves more than the issue of whether the general use of firearms by guards was necessary. Even assuming that the prison officials did not violate the Eighth Amendment by storming the cellblock with shotguns rather than using less drastic options for resolving the disturbance, sufficient evidence was introduced to allow a jury to find that there was no need whatsoever to direct any gunshot at Albers. By the time the assault squad entered the cellblock, the level of the disturbance had subsided, with Klenk being the sole protagonist. There was no reason to shoot indiscriminately at others, particularly Albers who was clearly not involved in the disturbance.

Petitioners mischaracterized this case as involving "a controversy over whether prison administrators, confronted with a serious prison riot and imminent risk of loss of life of inmates and guards, made an inaccurate assessment of how best to defuse that threat and regain control of a cellblock". (Petition pages 6-7). When the armed guards stormed the cellblock, there was neither a serious prison riot occurring, nor an imminent risk of loss of life of inmates and guards. As such, a disabling action to Klenk alone would have regained order without any physical harm to guards or other inmates. Unfortunately, the prison officials decided to take the "shotgun approach", amounting to a deliberate indifference to the physical safety of innocent persons.

Second, petitioners have ignored the evidence that the armed guards entering the cellblock were not told to and did not give inmates verbal commands or warnings before shooting at them. The stairway to the second tier was Albers' only route for returning to his cell. Yet, neither Kennecott nor any other guard instructed Albers to remain away from the stairway or gave a command such as "stop or I'll shoot". Even the State's expert witness, Roger Christ agreed that, given enough time, the guard should have yelled, "stop, lie down, stay where you are" if officers did not want inmates heading up the stairs. A jury could have found that the prison officials' approach in resolving the disturbance was "hopelessly flawed", at least to the extent that it placed Albers in a position where serious physical injury was unavoidable. The trial court usurped the jury's function by resolving contradictions in evidence and passing upon the credibility of witnesses. Albers v. Whitley, 743 F2d 1372, 1375 (9th Cir. 1984).

A WRIT OF CERTIORARI SHOULD NOT BE ALLOWED

I. This case presents none of the special and important reasons for which the Court should grant a Writ of Certiorari under Rule 17. The Ninth Circuit decision is not in conflict with a decision of another Federal Court of Appeals or State Court. Moreover, the lower court has decided neither an important question of federal law which has not been but should be settled by this Court nor a federal question in a way in conflict with applicable decisions of this Court. Rather, the Ninth Circuit decision applies the Eighth Amendment's proscription against cruel and unusual punishment in conformity with the rulings of this Court and lower federal and state courts which

have spoken on this constitutional principle.

The Ninth Circuit understood that prison officials must be given considerable latitude in dealing with a crisis or other institutional need. However, in ruling as it did, the lower court paid respect to the teaching that "[t]here is no iron curtain drawn between the Constitution and prisons of this country". Wolff v. McDonnell, 418 US 539, 555-556 (1974); Bell v. Wolfish, 441 US 520, 545 (1979).

With these principles in mind, the Ninth Circuit stated:

> "`Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry' Bell v. Wolfish. . . Moreover those authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis. . .
>
> On the other hand, the latitude accorded to prison authorities does not mean they are authorized to use any amount of force, however great. Ridley v. Leavitt, 631 F2d 358, 360 (4th Cir 1980). In our view a proper standard deems that Eighth Amendment to have been violated when the force used is `so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time.' Jones v. Mabry, 723 F2d 590, 596 (8th Cir 1983), cert. denied, ____ US ____ . . . Thus if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary, Albers' constitutional right would have been infringed. Similarly, if the emergency plan was adopted or carried out with `deliberate indifference' to the right of Albers to be free of cruel unusual punishment, then the eighth amendment has been violated." [citations omitted].

Albers v. Whitley, supra, at 1375.

The Ninth Circuit adopted those established interpretations of the Eighth Amendment which have application to the circumstances presented in this case. It then concluded, as an evidentiary matter, that Albers presented sufficient evidence to

allow a jury to find that his constitutional rights had been violated. The Ninth Circuit merely held that the trial court should not have directed a verdict against Albers and that the jury should have been given the opportunity to decide whether the force used against him was unnecessary, unreasonable, and grossly excessive under the circumstances presented by this particular case.

In essence, petitioners argue that an inmate's Eighth Amendment rights should fall to the wayside during the course of "riot". There is no basis for the proposition that prison officials are immune from liability, under the Constitution, for the use of excessive and unnecessary force during a "riot". Petitioners seem to be seeking the same immunity under federal law as it has under Oregon law. [1]

Petitioners argue that Ninth Circuit opinion has improperly grafted a tort standard onto the Eighth Amendment. (Petition, page 11) This argument ignores the Ninth Circuit's explicit direction that "it is not enough for Albers to show that he may have been the victim of a state law tort; he must show a violation of the Constitution or federal statute" Albers v. Whitley, supra, at 1374. As stated by the lower court, the Constitution is violated when the state manifests deliberate indifference to plaintiff's rights to be free of cruel and unusual punishment which, in the present case, arises when there occurs unjustified infliction of bodily harm upon a prisoner by or

[1] ORS 30.265(3)(e) provides prison officials with immunity from liability for "any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of the foregoing". Albers' complaint included a pendent state claim under the state tort claims act, which the District Court dismissed based upon ORS 30.265(3)(e). The Ninth Circuit upheld the dismissal of the pendent state claim.

within the authority of state officials, Id.; Miller v. Solem, 728 F2d 1020 (8th Cir. 1984); Haygood v. Younger, 718 F2d 1472 (9th Cir. 1983); King v. Blankenship, 636 F2d 70 (4th Cir. 1980).

To be sure, there can be some overlap between common law tort and constitutional analysis. For example, Burton v. Waller, 502 F2d 1261 (5th Cir. 1974), cited by petitioners (Petition, page 10), involved a claim under 42 USC Section 1983 for damages arising from fatalities and injuries from gunfire used by police during a student demonstration. The Fifth Circuit held that the police could use common law tort defenses against the substantial constitutional claim promoted by the students.

Petitioners erroneously imply that the students in Burton were limited to a common law tort rather than a constitutional remedy. Similarly, in their hypothetical reference, petitioners wrongly assert that the persons who took control of the nuclear power plant, would be restricted to a state tortious assault and battery claim (Petition, page 10). These persons may very well have a remedy under the Due Process Clause if police shoot them unnecessarily, in light of the particular circumstances.

In any event, persons demonstrating on a college campus or at a nuclear power plant are not within the absolute control and custody of law enforcement personnel. On the other hand, prisoners' well-being and personal safety is dependent, every day and every hour of each day, totally on the actions of corrections officers.

Accordingly, the Ninth Circuit properly applied this Court's decision in Estelle v. Gamble, 429 US 97 (1976) to this case. The Court, in Estelle, was concerned about denial of medical care

resulting in pain and suffering which does not serve any penological purpose.

> "The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying common law view that `[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.'
>
> We therefore conclude that the deliberate indifference to serious medical needs of prisoners constitutes the `unnecessary and wanton infliction of pain' [citation omitted] proscribed by the eighth amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoners' needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with treatment once prescribed . . . Id., at 103-104. [emphasis added]

Thus petitioners are wrong in stating that Estelle did not involve intentional action (Petition at page 13). Petitioners are also mistaken in seeking to distinguish this case from Estelle by asserting at page 13 of its petition

> "In a prison riot setting, where there is no dispute that remedial action should have been taken, and the only disagreement is whether the degree of force used was proportionate to the perceived danger, the cruel and unusual punishment clause has no application. In that setting, the Eighth Amendment is triggered only where the force is wholly without penological purpose.'"

Petitioners have provided no support for this position. Even "prison riots" must be viewed individually. If evidence shows that a riot could have been resolved by temporarily inconveniencing inmates through use of tear gas for example but, instead, prison officials shot firearms indiscriminately at inmates causing death or serious injury, it would be hard to see any penological purpose in the officials' actions. More specifically, the issue in this case is not solely whether petitioners had a penological purpose in using shotguns as a general matter. Rather, the real question is whether it was necessary, from a penological perspective, to shoot Albers.

Petitioners are exaggerating the extent to which the Ninth Circuit reasoning would interfere with its response to prison distrubance. A "well intentioned" false step would not subject officials to liability. On the other hand, if that false step is precipitated by "deliberate indifference" to the physical well-being of prisoners, liability may result.

The issue correctly decided by the Ninth Circuit was whether, in fact, Albers had presented enough evidence to allow a jury to decide whether petitioners had employed unnecessary force under the circumstances presented by this case. Albers suffered permanent nerve damage to his left leg and residual paralysis. Even in the context of a "riot" the Eighth Amendment would not allow prison officials to subject an inmate to such serious physical injury unless it was necessary.

The Ninth Circuit decision establishes no new Eighth Amendment principles. The lower court did nothing more than allow Albers the opportunity to present his facts to a jury and have it determine whether, based upon established Eighth Amendment standards, petitioners met their constitutional duty to him. The fact that a "riot" had taken place in the cellblock is important and gives petitioners a handle to argue that they acted reasonably in shooting at Albers. However, the ultimate decision on liability should be left to a jury.

II. The petitioner claims that the lower court has made a

qualified immunity defense unavailable to them. (Petitioner's petition, page 19). The Ninth Circuit said that if a jury was to find that the defendants' actions were undertaken with deliberate indifference to Albers' rights, they could not then avail themselves of a claim that their actions were undertaken with good faith. In reality, a qualified immunity defense is available in that a finding of "deliberate indifference" must implicitly include a finding that "good faith" was absent. "Good faith" is inconsistent with "deliberate indifference". See, Miller v. Solem, supra; Haygood v. Younger, supra; Whisenant v. Yuam, 739 F2d 160 (4th Cir. 1984); Llaguno v. Mingey, 739 F2d 1186 (7th Cir. 1984).

Petitioner argues that the Ninth Circuit's analysis of the qualified immunity issue is flawed because Albers' constitutional right was not clearly established at the time of the events in questions. Yet there can be no doubt but that, at the time the events here took place (June 27, 1980), the law was clearly established that prison officials may not use excessive or unnecessary force against prisoners. See, e.g., Spain v Procunier, 600 F2d 189, 195 (9th Cir. 1979), appeal after remand, sub nom, Spain v. Maintanos. 690 F2d 742 (1982); Little v. Walker, 552 F2d 193 (7th Cir. 1977) cert. denied 435 U.S. 932 (1977); Arroyo v. Schaeffer, 548 F2d 47 (2nd Cir. 1977); Greear v. Loving, 538 F2d 578 (4th Cir. 1976); Bruce v. Wade, 537 F2d 850, 853 (5th Cir. 1976); Johnson v. Glick, 487 F2d 1028 (2nd Cir. 1973), cert. denied 414 U.S. 1033 (1973); Howell v. Cataldi, 464 F2d 272, 282 (3rd Cir. 1972); McCargo v. Meister, 462 F.Supp 813 (D. Md 1978); Beishir v. Swenson, 331 F.Supp 1227 (W.D. Mo. 1971).

That none of the foregoing cases involves a prison riot and hostage rescue situation does not defeat their adequacy as precedent that unnecessary force would be unconstitutional. The immunity defense fails when a clearly established constitutional right is violated. Harlow v. Fitzgerald, 457 US 800 (1982). The settled law for purposes of the qualified immunity test may be established not only by U.S. Supreme Court decisions, but by reference to opinions of courts of appeals or local federal district courts. Procunier v. Navarette, 434 US 555, at 565-66 (1978).

In Picha v. Wielgos, 410 F.Supp 1214, 1219 (N.D. Ill. 1976), the court rejected an overly technical view of what constitutes adequate precedent to alert an official to the fact that conduct would be unconstitutional. The court said:

> "...In terms of the policies set forth in Wood [Wood v. Strickland, 420 US 308 (1975)], it appears that law can be settled without there having been a specific case with identical facts which was decided inversely to the school officials. There is a limitation to the notion that school officials can have one "free" constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting."

Even though the court in that case found that the factual situation was novel, it held that the law which should have been applied to it was clear. Thus, the court declined to instruct the jury on any good faith immunity.

A similar conclusion was reached in Little v. Walker, supra, wherein the court held that defendant

> "Cannot hide behind a claim that the particular factual tableau on question has never appeared in haec verba in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconsti-

tutionality, a prison official may not take solace in ostrichism."

There can be no dispute that petitioners "knew or should have known" that prison officials may not use excessive or unnecessary force against prisoners. Significantly, the Correction Division's Rule Governing Process for Use of Physical Force, Weapons, Chemical Agents and/or Restraints," states that "only the minimum degree of physical force which is necessary on any particular occasion will be used."

CONCLUSION

The Ninth Circuit applied accepted Eighth Amendment standards in reversing the District Court's directed verdict against respondent. Its decision merely allows a jury to determine whether the facts of this specific case show that petitioners were deliberately indifferent to respondent's physical well-being, by unnecessarily using firearms against him. As long as prison officials act with good intentions and do not ignore the safety of the prisoners under their control, they need not fear liability for damages under 42 USC Section 1983.

There is no reason for the Court to review this case, which merely presents an isolated instance in which excessive force was allegedly employed. This is not a suit challenging some system wide prison policy or practice. Should a jury eventually find in respondent's favor, there is no reason to believe that the verdict would have application beyond the circumstances of this specific case.

Respectfully Submitted,
GOLDBERG & MECHANIC

By Gene Mechanic
Gene B. Mechanic
Counsel for Respondent

No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et. al.,

Petitioners,

v.

GERALD ALBERS

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*GENE B. MECHANIC
ALICE GOLDSTEIN
Attorneys at Law
Suite 301
1727 N.W. Hoyt Street
Portland, Oregon 97209
Phone: (503) 224-2372
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED DEC. 31, 1984
CERTIORARI GRANTED JUNE 10, 1985

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The following opinions have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

CHRONOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 8, 1981—Plaintiff's Complaint for Damages and Demand for Jury Trial filed in the United States District Court for the District of Oregon.

Aug. 19, 1981—Defendants' Answer filed in the United States District Court for the District of Oregon.

May 21, 1982—Plaintiff's Amended Complaint for Damages and Demand for Jury Trial filed in the United States District Court for the District of Oregon.

[Plaintiff's Amended Complaint raised no new issues and an Amended Answer was deemed unnecessary.]

June 1-3, 1982—Trial was held in the United States District Court for the District of Oregon.

June 3, 1982—Defendants' Motion for Directed Verdict as to all defendants granted.

June 4, 1982—Stipulated Facts filed in the United States District Court for the District of Oregon.

August 31, 1982—Judgment of the United States District Court for the District of Oregon.

Sept. 29, 1982—Plaintiff filed Notice of Appeal in the United States Court of Appeals for the Ninth Circuit.

Oct. 1, 1984—Opinion of the United States Court of Appeals for the Ninth Circuit.

Dec. 31, 1984—Defendants' Petition for Writ of Certiorari filed.

June 10, 1985—Certiorari granted.

RESPONDENT'S AMENDED COMPLAINT DAMAGES—DEMAND FOR JURY TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[filed May 21, 1982]

GERALD ALBERS, Plaintiff, v. HAROL WHITLEY, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary; HOYT C. CUPP, individually and in his official capacity as Superintendent at the Oregon State Penitentiary; J.C. KEENEY, individually and in his official capacity as Assistant Superintendent at the Oregon State Penitentiary; and ROBERT KENNECOTT, individually and in his official capacity as a correctional officer at the Oregon State Penitentiary, Defendants.	)	Civil No. FIRST AMENDED COMPLAINT - DAMAGES DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. This is a civil action seeking damages against defendants authorized by 42 U.S.C. § 1983, and the Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded on 28 U.S.C. § 1343. Plaintiff further invokes the pendent jurisdiction of this court to consider claims arising under Oregon state law.

2. Venue in this district is proper under 28 U.S.C. § 1391(b).

PARTIES

3. Plaintiff Gerald Albers is, and was at all times described in this complaint, a citizen of the United States and an inmate at the Oregon State Penitentiary in Salem, Oregon.

4. Defendant Harol Whitley is and was at all times described in this complaint an assistant superintendent of the Oregon State Penitentiary and, in such capacity, led an attack by correctional officers on inmates in Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

5. Defendant Hoyt C. Cupp is and was at all times described in this complaint superintendent of the Oregon State Penitentiary and, in such capacity, authorized a raid by correctional officers on Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

6. Defendant J.C. Keeney is and was at all times described in this complaint an assistant superintendent of the Oregon State Penitentiary and, in such capacity, authorized a raid by correctional officers on Cell Block A of the Oregon State Penitentiary during a disburbance on or about June 27,

1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

7. Defendant Robert Kennecott is and at all times described in this complaint was a correctional officer at the Oregon State Penitentiary and, in such capacity, participated in a raid on Cell Block A of the Oregon State Penitentiary during a disturbance on or about June 27, 1980. He is being sued individually and in his official capacity. He maintains offices at 2605 State Street, Salem, Oregon.

8. In doing all the acts herein alleged, all of the defendants, and each of them, were and are acting under color of state law, custom and usage, and by virtue of the authority vested in each of them by the Constitution and the laws of the State of Oregon and the capacities as heretofore and hereinafter alleged.

9. At all times relevant herein, defendants, and each of them, knew, or should have known, of the acts, omissions and conditions alleged herein, and that said acts, omissions and conditions violated plaintiff's Constitutional and statutory rights.

FIRST CLAIM FOR RELIEF

10. Plaintiff was housed in Cell 274 of Cell Block A at the Oregon State Penitentiary on June 27, 1980, when a disturbance began at approximately 9:15 p.m. The inmates in Cell Block A, numbering in excess of 200, had not yet been confined to their cell for the evening.

11. Upon information and belief, on June 27, 1980, at approximately 9:15 p.m., several inmates in Cell Block A became distressed when it appeared that other inmates who were being taken to the prison's segregation and isolation building were being mistreated by corrections officers as they passed in front of Cell Block A. Several of the Cell Block A inmates then became unruly and one of them, Richard Klenk, produced a knife and seized Oregon State Penitentiary Corrections Officer Stan Fitts, who was then assigned to Cell Block A, as a hostage.

12. Cell Block A consists of two tiers, with 56 cells on the upper tier and 55 cells on the lower tier. The lower tier is adjacent to an open area in which there is a stairway leading to the upper tier. A door which provides access from the lower tier to the open area was locked immediately after the disturbance began, confining the inmates in the lower tier. Inmates on the upper tier were still able to ascend and descend the stairs from the upper tier to the open area.

13. Corrections Officer Fitts was taken by Klenk to cell 201, on the upper tier on Cell Block A.

14. Defendant Whitley entered Cell Block A and immediately learned that inmate Klenk was commanding the disturbance. Defendant Whitley talked to Klenk and Officer Fitts, learning that Officer Fitts was unharmed.

15. In the meantime, plaintiff had been requested by other inmates on the upper tier to leave his cell and go down to the area outside the lower tier to help calm down the disturbance. Plaintiff proceeded to the area outside the lower tier,

where he attempted to calm down inmate Klenk and spoke with defendant Whitley. At the suggestion of another inmate, plaintiff asked defendant Whitley whether he could open the locked door to the lower tier cells to let a few elderly inmates leave the cell block while the disturbance was being resolved. Defendant Whitley said he would get the key to the locked door and exited the cell block.

16. Upon information and belief, defendant Whitley then consulted with defendants Cupp and Keeney about the disturbances. The three officials determined that corrections officers should raid the cell block with rifles.

17. Plaintiff waited in the stair-well area on the lower tier to provide whatever help he could in resolving the disturbance. Defendant Whitley then returned to the cell block and plaintiff reminded him about the elderly inmates in the lower tier cells. Defendant Whitley said that he was not able to get the key to the locked door and immediately turned toward the main cell block entrance and yelled "let's go." Numerous corrections officers ran into the cell block, responding to defendant Whitley's scream to "shoot these bastards."

18. Plaintiff started up the stair-well to his cell when defendant Kennecott discharged his shotgun into the back of plaintiff's left leg.

19. Prior to the shooting, defendants Whitley and Kennecott knew or should have known that plaintiff neither promoted nor participated in the disburbance and was in the stair-well area on the lower tier outside the lower tier cells in order to help achieve a quick and safe resulution [*sic*] of the disburbance.

20. Prior to the shooting, defendants Whitley and Kennecott knew or should have known that plaintiff was unarmed and presented no danger to them, or anyone else.

21. Upon information and belief, defendants Cupp and Keeney authorized defendant Whitley to lead an armed raid on Cell Block A without regard to the physical safety and welfare of persons in the cell block, nor with concern for protecting those persons who were not involved in the disturbance.

22. After being shot, plaintiff was bound at his wrists and dragged upon his back, side and stomach, to an area outside of Cell Block A, where he was left unattended, without medical assistance, for approximately one hour.

23. As a direct and proximate result of defendants' intentional and reckless acts described above, which were deliberately indifferent to plaintiff's physical well-being, plaintiff has sustained severe nerve damage to his left lower leg, with residual paralysis, to plaintiff's general damage in the amount of $150,000 [*sic*] $250,000 and to plaintiff's special damage in the amount of $18,576.65.

24. The acts of defendant were willful, malicious and contrary to their societal obligations, and plaintiff is entitled to recover an additional $100,000 in punitive damages against defendants.

25. The acts and omissions of defendants, and each of them, deprived plaintiff of his rights to be free from cruel and unusual punishment and to due process under the Eighth and Fourteenth Amendments to the United States Constitution, respectively.

SECOND CLAIM FOR RELIEF

Plaintiff realleges paragraphs 1 through 23 of the complaint filed therein.

The acts and conduct of the defendants constitute assault and battery, and negligence under the laws of the State of Oregon, and this court has pendent jurisdiction to hear and adjudicate said claims. Plaintiff served written notion of his claims against defendants on November 14, 1980, in accordance with ORS 30.275(1).

WHEREFORE, plaintiff hereby demands:

1. A jury trial in this proceeding;

2. General damages in the amount of $250,000 and Special Damages in amount of $18576.65 based upon both plaintiff's First and Second Claims for Relief;

3. Punitive damages in the amount of $100,000, based upon plaintiff's First Claim for Relief;

4. Judgment against defendants on account of his costs, disbursements and reasonable attorney fees incurred herein.

6) Such further relief as the court may deem just and proper.

[Signature omitted in printing]

PETITIONERS' ANSWER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[filed August 19, 1981]

[Title of case omitted in printing]

Comes now defendants Harol Whitley, Hoyt C. Cupp, J.C. Keeney and Robert Kennecott, by and through their attorney, Scott McAlister, Assistant Attorney General, and for answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I

(1) Admit paragraph 1.

(2) Admit paragraph 2.

PARTIES

(3) Admit paragraph 3.

(4) Admit defendant Whitley supervised a force of correctional officers who entered cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein. Allege defendant Whitley at that time was the Security Manager of the Oregon State Penitentiary.

(5) Admit defendant Cupp's described supervisory position and that he authorized a force of correctional officers to enter cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(6) Admit defendant Keeney's described supervisory position and that he supported and acquiesced in the decision to authorize a force of correctional officers to enter cellblock A

with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(7) Admit defendant Kennecott's described position and that he participated as a member of force of correctional officers who entered cellblock A with the express purpose of regaining control of said cellblock and freeing a hostage held therein.

(8) Admit paragraph 8.

(9) Deny paragraph 9.

FIRST CLAIM FOR RELIEF

(10) Admit paragraph 10.

(11) Admit paragraph 11.

(12) Admit paragraph 12.

(13) Admit paragraph 13.

(14) Admit defendant Whitley entered cellblock A and was told by inmate Klenk that he (Klenk) was in control. Allege defendant Whitley then requested that Klenk calm the disturbance and that when Klenk yelled out to calm down, the disturbance in fact increased. Admit defendant Whitley determined Officer Fitts was as yet unhurt. Allege Officer Fitt's [*sic*] life was threatened at that time.

(15) Defendants are without knowledge or information as to what other inmates requested of plaintiff. Deny plaintiff tried to calm inmate Klenk down while defendant Whitley was present nor did plaintiff speak with defendant Whitley at any time prior to the discharge of firearms.

(16) Admit defendants consulted and determined the necessity to use firearms which are alleged to be shotguns armed with birdshot.

(17) Deny paragraph 17 except as to defendant Whitley yelling "let's go" or words to that effect. Allege plaintiff was seen standing nearby by [*sic*] defendant Whitley and that plaintiff did nothing to calm the disturbance nor did he speak to defendant Whitley. Allege that a plan of action had already been arrived at which precluded any unnecessary shooting and/or injury.

(18) Admit plaintiff was shot by an officer entering cellblock A. Allege a warning shot was fired first by defendant Kennicott [*sic*]. Defendants are without knowledge as to who actually shot plaintiff.

(19) Deny paragraph 19.

(20) Deny paragraph 20.

(21) Admit defendants Cupp and Keeney authorized armed officers to enter cellblock A. Deny that they did so without regard for the safety of those therein. Allege defendants actually discussed and directed that shooting and injuries were to be held to an absolute minimum.

(22) Deny paragraph 22. Allege plaintiff was treated by a hospital technician within a few minutes of being struck, was transported to the penitentiary hospital without any restraints and was only placed in restraints upon being transported to Salem Memorial Hospital.

(23) Deny paragraph 23.

(24) Deny paragraph 24.

(25) Deny paragraph 25.

SECOND CLAIM FOR RELIEF

Defendants incorporate their answers to plaintiff's 1-23 as to plaintiff's second claim for relief.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE:

Defendants allege that at all times herein mentioned in plaintiff's complaint, they were acting in good faith and within their discretion pursuant to the laws and statutes of the State of Oregon and the United States, and had good cause to believe, and do believe, their conduct was proper.

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE:

Defendants allege and contend that if liability is determined, they are immune from liability for punitive damages and assessment of costs and disbursements as a matter of law.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE:

Allege that defendants are immune from liability as a matter of law.

WHEREFORE, defendants pray for judgment herein denying plaintiff relief and granting defendants their costs, disbursements and attorney fees incurred in the defense hereof.

[Signature and certification omitted in printing]

RESPONDENT'S STIPULATED FACTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Read to the jury by agreement of the parties, see Tr. 53-60, and filed June 4, 1982]

[Title of case omitted in printing]

1. Plaintiff Gerald Albers was an inmate at the Oregon State Penitentiary in Salem, Oregon, on June 27, 1980. Plaintiff Albers was then housed in Cell Block A of the penitentiary.

2. Defendant Harol Whitley is now, and was on June 27, 1980, the Security Manager of the Oregon State Penitentiary. Acting in his official capacity, defendant Whitley supervised a force of correctional officers who entered Cell Block A on June 27, 1980, following a disturbance in the cell block.

3. Defendant Hoyt C. Cupp is now, and was on June 27, 1980, Superintendent of the Oregon State Penitentiary. Acting in his official capacity, defendant Cupp authorized a force of correctional officers to enter Cell Block A on June 27, 1980, following a disturbance in that cell block.

4. Defendant J. C. Keeney is now, and was on June 27, 1980, an Assistant Superintendent of the Oregon State Penitentiary. Acting in his official capacity, defendant Keeney authorized a force of correctional officers to enter Cell Block A on June 27, 1980, following a disturbance in that cell block.

5. Defendant Robert Kennecott is now, and was on June 27, 1980, a correctional officer at the Oregon State Penitenti-

ary. Acting in his official capacity, defendant Kennecott participated as a member of a force of correctional officers who entered Cell Block A on June 27, 1980, following a disturbance in that cell block. At the time of entering the cell block, defendant Kennecott carried a shotgun.

6. In doing all the acts described in this litigation, all of the defendants were acting under color of state law, custom and usage, and by virtue of the authority vested in each of them by the Constitution and the laws of the State of Oregon.

7. Cell Block A consists of two tiers, with 56 cells on the upper tier and 55 cells on the lower tier. The cell block houses over 200 inmates. The lower tier cells are adjacent to an open area from which there is both a stairway leading to the upper tier and a hallway leading out of the cell block. The lower tier cells are separated from the open area by floor-to-ceiling bars. A barred door allows for access from the lower tier cells to the open area.

8. Cell Block A is an "honor" cell block, wherein inmates who have good disciplinary records are housed. Cell Block A inmates have privileges, including more time outside of their cells which are denied the remainder of the prison population. Normally, Cell Block A inmates are not required to remain in their cells, or, in other words, "cell-in," until 11:00 p.m. on weekdays and 12:00 a.m. on weekends.

9. On Friday night, June 27, 1980, some inmates in Cell Block A became distressed when it appeared that other inmates who were being taken to the prison's segregation and isolation building were being mistreated by corrections

officers as they passed in front of Cell Block A. Two corrections officers, Walker S. Fitts and John Kemper, were on duty in Cell Block A at the time. Although it was only approximately 9:15 p.m., nearly three hours before inmates would normally be required to cell-in, Officer Kemper received a telephone call in which he was told to order all inmates in Cell Block A to return to their cells. Officer Kemper, in turn, gave an order to Cell Block A for inmates to cell-in. At the time that he gave the order, Officer Kemper was standing in the open area adjacent to the lower tier cells and plaintiff was at his upper tier cell #274.

10. Several inmates questioned Officer Kemper as to why he gave the order to cell-in. One inmate, Richard Klenk, became particularly upset. Officer Kemper left the cell block but Officer Fitts, who was standing nearby, remained.

11. The steel barred door which provides access from the lower tier cells to the open area in front of the cell block was locked at some point after Officer Kemper left A Block.

12. Shortly after Officer Kemper left the cell block, some inmates began to break furniture. Two inmates then told Officer Fitts to go into an office off of the open area, saying that he would be protected there. After Officer Fitts entered the office, the door to it was closed.

13. Defendant Whitley then entered Cell Block A, climbing over some furniture which had been placed by inmates in the hallway leading into the cell block. Defendant Whitley talked with inmate Klenk. Four inmates were then allowed to go to the segregation and isolation building to see the condi-

tion of the inmates who had been taken there earlier. Defendant Whitley left the cell block with the four inmates, who then visited the segregation and isolation building and returned to Cell Block A.

14. Defendant Whitley returned to Cell Block A several minutes later and asked inmate Klenk to allow him to see Officer Fitts. Inmate Klenk walked over to the office where Officer Fitts was located and returned with him to see defendant Whitley.

15. Defendant Whitley determined that Officer Fitts was unharmed. Defendant Whitley left the cell block and Officer Fitts returned to the office. At some point, inmate Klenk had received a home-made knife.

16. Officer Fitts remained in the office for another 15 minutes, when he was escorted to cell #201 on the upper tier. Inmates placed him in cell #201 and then stood in front of the cell.

17. The two inmates who were housed in cell #201, Kurt Riemer and Michael Kliment, remained in Officer Fitts' vicinity.

18. Defendant Whitley entered Cell Block A for a third time. He asked inmate Klenk to show him where Officer Fitts was located. Inmate Klenk took defendant Whitley up to cell #201. Defendant Whitley approached Officer Fitts, asked him if he was alright, [*sic*] and Officer Fitts responded that he remained unharmed. At the time defendant Whitley spoke with Officer Fitts, two inmates of Cell Block A were inside cell 201 and advis d [*sic*] defendant Whitley that they would

prevent any harm to Officer Fitts. Defendant Whitley then left cell 201 and went downstairs.

19. At about 10:30 p.m., defendant Whitley again entered Cell Block A, leading a group of corrections officers, three of whom were armed with shotguns. Defendant Kennecott, carrying a shotgun, followed defendant Whitley. Corrections officers Clinton Smith and David Jackson, also armed with shotguns, entered the cell block after defendant Kennecott.

20. While entering the cell block, defendant Kennecott discharged a first shot into the wall opposite the cell block entrance.

21. After discharging the first shot, defendant Kennecott discharged second and third shots towards the direction of plaintiff. One of these latter two shots hit plaintiff in his knee.

22. In the meantime, defendant Whitley had run up the stairs towards cell #201, chasing inmate Klenk, who had also begun to run up the stairs. Defendant Whitley ran past plaintiff, who had been standing at the bottom of the stairs.

23. From the time a cell-in order was issued, at about 9:15 p.m., until he was shot, at about 10:30 p.m., plaintiff received no orders or instructions from defendants or other corrections officers relating to his movement or location within the cell block, nor an opportunity to seek safety.

24. Defendant Whitley subdued inmate Klenk in front of cell #201. The inmates housed in cell #201 had prevented inmate Klenk from entering that cell. With inmate Klenk

under control, Officer Fitts left cell #201 and exited from the cell block.

25. Defendant Whitley was authorized by defendants Cupp and Kenney [*sic*] to enter Cell Block A with firearms.

26. The rules and procedures under which defendants perform their duties require that the use of physical force by staff members will occur only when the exercise of persuasion, advice and warnings are found to be insufficient to obtain cooperation. Additionally, physical force will be used only with due regard for the safety of staff and the safety of others. Only the minimum degree of physical force which is necessary on any particular occasion will be used.

27. The rules and procedures under which defendants perform their duties require that staff members shall exhaust every reasonable means of control before resorting to the use of firearms.

28. Plaintiff is known by defendants to be a well-behaved inmate.

[Paragraphs 29 and 30 were deleted from the stipulation by agreement of trial counsel]

31. A call for an ambulance was made at 9:43 p.m. An ambulance was dispatched at 10:27 p.m., and left the penitentiary at 11:00 p.m.

[Signatures omitted in printing]

TRANSCRIPT OF TRIAL

(excerpt)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title of case omitted in printing]

[June 3, 1982]

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* * * * *

MR. MCALISTER: May it please the Court. Again, directing the Court's attention to our motion for summary judgment, we would reraise all issued [*sic*] therein stated, only we would not raise them with respect to a motion for directed verdict at the conclusion of the

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case.

If the Court wishes, I can address each separate issue we are raising.

THE COURT: Yes, I would like for you to.

MR. MCALISTER: I will not re-read, unless the Court specifically asks, the memorandum which we have previously submitted.

THE COURT: It's not necessary to read the whole memo, but I do want you to point out the particular cases that you rely upon and make your legal argument.

MR. MCALISTER: We would first ask the Court to treat each defendant separately in this matter. And we would point out, as we have previously, that we believe that the Constitutional issues are completely separate from the state issues. I

would begin by suggesting to the Court that the state issues be dismissed on the ground that as a matter of law, the state officials are immune from liability under state law. We are not now addressing the issue of the Constitutional limitation. I certainly would agree that the state law cannot make state officials immune from a 1983 action, but we would contend that separately under the state statutory provisions relating to the control of riots, these defendants are immune from liability in the state courts, and therefore the

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pendent jurisdiction must be dismissed with respect to that.

Addressing now the initial issue, which is whether or not plaintiffs have proved an Eight [*sic*] Amendment violation. Defendants would contend that the pivotal case, the one which defines the law as far as the Eighth Amendment is concerned, is the case of *Estelle vs. Gamble*. We would submit to this Court that there is absolutely no showing that, one, the force used was used for punishment; two, there was at no time any evidence of administrative indifference, and there was no evidence of wanton inflicting of unnecessary pain.

That being the case, there is no showing of an Eighth Amendment violation, and as to that, the case should be removed from the jurisdiction considered and directed judgment on that issue be entered for the defendants.

The Fourteenth Amendment allegation is substantially more complex. We have set a large number of cases forth on that issue, and I would submit to the Court at the outset that it's clear that the case law is very confusing to what standard

is to be applied. However, we would contend that there is no evidence that the intent of any of the defendants was to

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violate a civil right of the plaintiff in this case, and it is in essence an accidental shooting. No one claims that the plaintiff was doing anything wrong. He was simply in the wrong place when the prison officials took the actions necessary to control the disturbance.

Now, I'll probably bore the Court a little bit, but I would like to go back to what 1983 actions were about in the first place. As the Court will recall, the 42 U.S. Code Section 1983, is an extremely old statute. It dates back to 1871, and I think it's extremely significant that one of the common names for that particular statute was the Ku Klux Klan Act of 1871, because I think that defines what Congress at that time was attempting to legislate about.

And basically, as the Court recalls, during that particular period of time — which was basically a period in which the Southern states had been defeated following a war and basically tossed out of the Governmental system, and the President of the Northern states had freed the slaves in the Southern states for all practical intents and purposes — there was a concern in Congress that as the Southern states were readmitted to the Union and allowed to govern themselves once again, the government in the Southern

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states would not afford the newly freed citizens their Constitutional rights, and that by governmental action the newly freed slaves would be prevented from

exercising these rights through fear, intimidation, outright assault, et cetera.

It certainly was never contemplated, I'm sure, at that particular period of time that subsequent inmates would be bringing suits against the custodians over the manner in which they were treated. I have no quarrel, however, with the application of the statute to that circumstance. I think it's just necessary to look at it in that context. But it was clearly designed to prevent people who are trying to keep other people or injure other people's Constitutional rights from doing that. It was a civil remedy intended much like the Exclusionary Rule to prevent intentional wrongdoing.

This is not an intentional wrongdoing case. There was no intent — there's been no evidence of intent in this case to deprive anyone of anything. The officials took the action necessary, not even against plaintiff, but against a general situation in which plaintiff, if not involved, was at least improperly present.

Therefore, I do not believe you can make a Fourteenth Amendment claim under those facts. Now,

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I'm aware that counsel argues that there is no intent requirement, and I think if you were talking about intent in terms of the criminal law, he might be correct. However, as far as civil intent is concerned, I think in a 1983 action, you have to have some intent to intimidate or violate a Constitutional right.

THE COURT: What do you say about the Parrett [*sic*] case?

MR. MCALISTER: Your Honor, I don't think anybody can say anything about the Parrett [*sic*] case, particularly since I think it was in either a dissenting or contrary opinion, the one justice wrote, "We once again put our shoulder to the wheel. If they did, they firmly missed the wheel once again. That particular case went off on very strange facts, and the central issue which I think both plaintiffs and defendants in many civil rights cases have been trying to present to the Supreme Court for a number of years now was once again missed, and that is the intent element.

In that particular case we view it as a case in which the allegation was that due process was not afforded, and the Supreme Court ducked the issue by saying, "Well, there is due process; you just didn't go get it." Now, that is the narrow holding, but I think the broader language must be implied to mean

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that it's not just enough that a Constitutional right was violated. You have to have some intent. You have to look at what the statute is trying to protect. In essence, what the plaintiffs have done in this case is, they simply bootstrapped a pure state negligence claim. You cannot point to one factor in that suit that could not have been presented to a state jury on state law.

As to liability for injuries: factually, now, there is the legal defense, but that is another matter. The fact that the state doesn't create a remedy doesn't mean it's a violation of the Constitutional right. There has been no challenge to the validity of that state statute, but as far as this is concerned, it's

a simple negligence action. It's no different than if an inmate fell down a flight of stairs, argued that the distance between the stairs was too great, and therefore they're injured because they were in the custody of the institution, because the institution was the one who put in the stair steps; they were injured as a result; their Constitutional rights have been violated.

I cannot imagine that in 1871, Congress contemplated creating a Federal negligence action. The only thing that differs in this case from a pure negligence

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shooting case is the fact that the shooters happened to be prison officials, and the inmate happened — or the plaintiff happened to be a prisoner. If the identical thing had happened, if a citizen was running down my house, passed my house, I try and interrupt a riot, I shoot him, we are in state court; there is no difference, and therefore, you cannot read Section — 42 U.S. Code Section 1983 simply to create a negligence action at the Federal level.

But that in essence is what the argument has to be. And therefore, we are contending that that is basically what all that has been proved in the case, and therefore we are entitled to have a dismissal of the Federal Constitutional claims.

Even if we weren't — do you want me to stop there?

THE COURT: Yes, that's fine, thank you.

Let me see Judge Friendly's decision.

All right, Mr. Mechanic, what do you say?

MR. MECHANIC: Well, Your Honor, I believe that we addressed the immunity question in the brief, and there is not much to add there. Other than that immunity section, according to legislative history, and the language doesn't apply —

THE COURT: Why do you contend it doesn't apply?

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MR. MECHANIC: Well, we attached the legislative history to our supplemental memo, or plaintiff's memo in opposition to defendant's motion for summary judgment, and that legislative history indicates that that was designed to protect public bodies and not individual personal liability, and I believe that other than that particular argument, there really isn't much more that I could say.

It doesn't apply to the particular circumstances of this case. We would not be able to, as I understand it, sue the State of Oregon, but according to Section 86 of the comments on the house bill which created that law — which are attached again to the memo — this section is added to preserve immunity from claims arising out of civil disturbances. Preservation of immunity in this instance is common in other states if it doesn't bar claim for torts committed by public employees during the course of civil disturbances, but would preclude claims based on a theory that a public body caused or failed to prevent a civil disturbance.

Liability insurance policies commonly exclude coverage of this risk, and that is simply not the purpose of the statute, but foreclose the opportunity of inmates who might be damaged under state law in

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the context of a disturbance to attempt to recover.

Now, as far as looking at 1983, I haven't been practicing for all that long, but when I started out working for the Attorney General's Office in another state, that is the same argument I used to give. It just doesn't hold water, going back to the Ku Klux Klan Act; it just doesn't hold water. There have been cases that have been decided through the years that have pretty well clarified the parameters of 1983. We are still trying — I agree with Mr. McAlister and understand some of the reasoning for it. But certain things are clear.

One thing is that it does clearly provide a remedy for persons who are under the custody of the state and subject to state action, and there are policy reasons for that. But I needn't go into that, as opposed to getting shot on the street. There may be policy reasons why that person should be in the state court, but if you are shot in a prison, regardless of the policy reasons, there is state action involved and your civil rights are violated, of course there is 1983 jurisdiction.

Now, as far as our attempt to bootstrap this into a negligence claim, I don't disagree with the fact that there are tremendous overlappings there between the state theories and the Federal theories. I think

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that we have a remedy in Federal court. We have a right to proceed in Federal court. We could have gone into state court, but that was not the choice. And clearly, we are not obligated to under 1983 to go first into state court, and if we have state claims that we can append, then we have a clear right to do so.

As far as the Eighth and Fourteenth Amendments are concerned, we have taken the position in our brief, and we reiterate that the courts really haven't defined exactly what the Eighth Amendment is and what the Fourteenth Amendment is as far as the use of force. They have established principles using those concepts, and there are many areas where Constitutional concepts intermingle, and this is one of them.

There is no question that prison officials are allowed to use force which meets the particular circumstance. The essence of this case is that they exceeded that ceiling, and by —

THE COURT: Let me ask you — that is the area I would like to hear you concentrate on a little bit — is the question of whether they exceeded the reasonable amount of force necessary. Is that question in all cases a question for a jury?

MR. MECHANIC: I believe that there may be situations where a plaintiff is not presented a

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prima facie case of establishing that the force that was used was in fact beyond the call of the situation, resulting in a particular injury to the plaintiff here involved.

As far as our readings are concerned, we haven't seen situations of cases — I don't know whether — haven't seen any from Mr. McAlister where there has been some type of an appeal from that type of decision. The cases, from looking at them, are being decided, and that by way of just example may

establish the burden anyway that needs to be applied in order not to present the case to a jury.

THE COURT: I assume you have seen the *Johnson vs. Glick* case which Judge Friendly wrote?

MR. MECHANIC: Yes, I have.

THE COURT: And probably have studied carefully. I note in that opinion that Judge Friendly, who is a very outstanding judge, on page 1033 said, in determining whether the Constitutional line has been crossed, "The court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the

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very purpose of causing harm."

Now, in that statement which he makes, which is obviously a very thoughful [*sic*] statement, he sets up two standards for determining whether there has been a Constitutional right involved, and they are — in the conjunctive, the first one is reasonable need for the force applied, basically, and he uses several examples to get to that point, but that is the first one.

And then he says, "and a good faith —" Now, I don't think there is any evidence in this case to indicate anything other than good faith. I think that there may have been hindsight. You can always find some other things that might have been done.

But are you saying in this case, in the context of a prison riot, that mere negligence or the failure to use reasonable care by itself is enough to submit this case to the jury?

MR. MECHANIC: Well —

THE COURT: On the Constitutional question. I'm not talking about the —

MR. MECHANIC: Right. If I could try to address that by maybe raising a couple considerations.

THE COURT: All right.

MR. MECHANIC: Judge Friendly is outlining some considerations, and I believe that is the context he

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puts them in. And he is not saying in order to find a civil rights violation you must meet A, B, C, and D. And if you look at each of those considerations, I think they fall very well into a decision that needs to be made by the factfinder.

THE COURT: When you go to a jury, then, how do you instruct with respect to those considerations?

MR. MECHANIC: Well, the considerations — we submitted the same instruction on those considerations except for the last one, and we didn't do that without some thought; not just trying to hope that someone would neglect to see the fourth consideration. And we mentioned that fourth consideration in our supplemental brief.

But I think there has been adequate testimony concerning whether or not there was the need for the application of this particular force, even by defendant's own experts. There have

been questions raised that if in fact the jury determined that certain factual circumstances exist, they can even rely on defendant's own experts. As far as the need —

THE COURT: Let me ask you this in that regard — and this is present in the case. We have two experts on each side here, each of whom propounded other things that might have been done. What do you think should

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have been done in this case that wasn't done? Why don't you just tell me what you think, now that the evidence is in, that it shows should have been done in the case?

MR. MECHANIC: Well, I guess we are almost getting to the summary argument.

THE COURT: That's what I want to hear. I want to hear what evidence do you think takes this case to a jury, and what the defendants did wrong. And I don't want detailed statements. I want you just to itemize them; tick them off for me.

Do you think they should have used tear gas?

MR. MECHANIC: I believe that tear gas would have taken care of that situation.

THE COURT: Well, my quetsion [*sic*] is, do you think they were — didn't use reasonable force in not using tear gas?

MR. ROTHSCHILD: [*sic*] Yes. I think that their own actions indicated that, because the main reason they say themselves that they didn't use tear gas — and there was a lot of confusion among the various defendants as to what was going on inside — even though Mr. Whitley had full opportunity to see what was going on inside. But we are dealing

with this barricade, and yet there was once again — and obviously we tried

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to bring this out — no relationship between the shooting and the particular effort made by Mr. Whitley in going up to cell 201.

THE COURT: Wasn't there? Wasn't there? What if somebody had attacked Mr. Whitley from behind going up the stairs?

MR. MECHANIC: Mr. Whitley said that he had passed inmates on the way, and no one attempted to obstruct him, including Mr. Albers, and there to shoot at those inmates — and we had testimony to be believed or not believed by the jury as far as our experts and also common sense — that a well-trained — and we're not questioning that we're dealing with a well-trained force. And Mr. Kennicott [*sic*] said he just stepped right over that barricade and shot while he was going over it. Could have run from that barricade to those stairs in a matter of a few feet, and at least syphoned off that area pretty quickly. Maybe some inmates would have gotten through.

THE COURT: So you are saying — what you are arguing, if I can try to isolate the point you are arguing, that they should have used tear gas; second, they should not have shot those men that were running up the stairs behind Mr. Whitley.

MR. MECHANIC: Well, they should not have shot

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them, number one, because no one ever indicated they presented a danger, and Mr. Whitley's own testimony —

THE COURT: I'm not asking for argument. I'm trying to get specifically to the point.

MR. MECHANIC: Yes, okay.

THE COURT: You are saying they should have used tear gas?

MR. MECHANIC: Yes.

THE COURT: They should not have shot those men that were running up the stairs?

MR. MECHANIC: And as a sub-part of that, they should not have shot those men without some type of warning, and that was not done after that warning shot, based on the defendant's own testimony, that from the point of view in the least that they might have gone up those stairs to other people who said that is what they expected.

So I think that is a very serious violation which goes way beyond the realm of negligence, goes way beyond the realm of, in my mind, deliberate indifference or certainly reaches that standard. They didn't care about those inmates. They cared about Officer Fitts and they had an absolute right to care about Officer Fitts, but they should have been more concerned about those people who are in their custody, and they didn't

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do that. And that is tied into — I'm getting into argument, I know that.

THE COURT: You don't think this could become a question of judgment, for example, as to whether it's better to injure those inmates and not risk losing Sgt Fitts? That is not a judgment question as far as you are concerned?

MR. MECHANIC: It's a judgment question if the circumstances were different than we presented. Where Mr. Fitts is in a cell and the indication is that — and it turned out that inmates helped out, and that no one else ever made any threats to Officer Fitts, and no one else ever indicated that they wanted to harm Officer Fitts, that Officer Fitts is known to be hiding by inmates, and that Mr. Whitley and the other corrections officers involved did really make an attempt, simply should have been done, at least, if they believe our experts.

And I don't think their experts even stressed that an attempt should not be done to really find out who's who in that kind of situation, and if you look at the facts here, that opportunity was there, and I think that amounts to the breaking of a duty that exceeds negligence significantly, although I stressed my negligence argument.

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There are other factors, and Mr. Cupp thinks that they ordered cell-ins throughout the evening. Mr. Whitley says he never did that. That's not just a matter of judgment; that is a matter of common sense, and if you break that, I do believe that it should be considered by the jury as to whether or not those circumstances warrant it.

Mr. Crist, his factual example of what he did with that hostage in his situation raised some very interesting questions

for the jury to consider, given the circumstances that we have presented here as well.

THE COURT: All right, anything else?

Do you want to say anything more?

MR. MCALISTER: Well, just briefly, because it came up first with respect to the argument about public bodies. If the Court will look at ORS 30.265, Section 3 — I will read it if I find it — it says — and this is incidentally under the Oregon Tort Claim [*sic*] Act, as I'm sure the Court is already aware — "Every public body acting within the scope of their employment or duties are immune from liability."

That's the way counsel wants you to read that section. It doesn't say that; it says, "Every public body and its officers and agents and employees [*sic*] acting within the scop [*sic*] of their employment or duties are

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immune from liability."

Section E: "Any claim arising out of riot, civil commotion or mob action, or out of any act or omission in connection with the prevention of any of the foregoing —" That would seem on its face to cover this very circumstance, and I haven't heard counsel argue, and I don't think he could, that this was not something that fell within ORS 30.265, § 36-D [*sic*].

He simply says it only applies to the state, and I don't know how you can read that plain language and reach that conclusion. Now, as the Court knows, in interpreting statutes the only time you look to legislative history, if it has any value at all, is when the statute itself is unclear. This is a clear statute.

In addition, in order to reach the reading that counsel suggests, you would have to not only go to the legislative history, but you would have to ignore what was actually written and passed. I suggest you simply can't do that.

THE COURT: All right, do you want to respond to that, Mr. Mechanic?

MR. MECHANIC: Yes, Your Honor. I don't believe that language is clear because of the manner in which it falls within the Tort Claims Act. I'm again going to sound for a moment like Mr. McAlister talking about

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1983, but the Tort Claims Act was designed to provide liability on the part of the state, not to restrict in any way that common law liability of public employees.

Before the Tort Claims Act was passed, you could always sue a public official, public employee. And the legislature decided that the state should also be liable in certain situations, and passed the Tort Claims Act.

THE COURT: Are you saying they couldn't at the same time they did that, though, grant immunity to the agents? That language is pretty —

MR. MECHANIC: Well, we believe that that language, if it's interpreted along with the legislative history, indicates that that is all that it was designed to do. I think in our brief we somewhat addressed those issues, although we felt that the language on what the intent was was so strong that we didn't consider them very much.

But in our brief, on pages 8 and 9, we did address the fact that the Tort Claims Act itself was clearly intended to remove the bar against holding the state liable for its torts and those of its officer, employees and agents which had existed under common law doctrine of sovereign immunity.

The Tort Claims Act, quote, "does nothing to

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change the exposure of tort liability of public employees, [*sic*] for claims arising out of their employment."

Sovereign immunity is different than employee immunity, and the Tort Claims Act, we believe, deals with sovereign immunity, not employee immunity. If the Tort Claims Act tried to restrict common law liability, Constitutional questions are raised under due process, and there are cases that have dealt with that.

There is an Oregon case dealing with the automobile guest statute restricting liability in that situation. And the Oregon Supreme Court said while the legislature may change the remedy or the form of exposure, attached conditions precedent to its excess [*sic*] and perhaps abolish old and substitute new remedies, it can't deny a remedy entirely that was granted under common law, and if we are — we must look behind that language, because if we don't, we are going to get into a direct conflict with, I think, the due process which we had with the guest statute.

THE COURT: All right —

MR. MECHANIC: It's a complex issue. It's unfortunate we have to deal with so many complex issues in this one case,

but that's where we are.

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THE COURT: All right. Mr. McAlister?

MR. MCALISTER: I think we have passed on from that one now, and I would like to discuss the position with respect to the options available to the institution. And we now slide once again dangerously close to confusing the argument with respect to whether or not a Constitutional violation occurred and the defendants' availability of a good faith or qualified immunity defense.

We are initially arguing there has been no Constitutional violation which is reviewable in a 1983 action. And to that end, I would particularly direct the Court's attention to two Ninth Circuit decisions. We have cited them, and I don't mean by citing these two again that we don't also rely just as heavily on the other cases we have cited, but the Ninth Circuit cases, particularly in *Meredith vs. State of Arizona* and *Spain vs. Procunier* requires actions intentional, unjustified, brutal and offensive to human dignity, intent to punish may be an element in deciding Eighth Amendment violations. Necessity is a major cruelty [*sic*].

And we would suggest for the Court as far as the Eighth Amendment violation is concerned, there is an intent requirement, and I don't know; I think these cases both in the Ninth Circuit and the Supreme

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Court in *Gamble vs. Estelle* clearly set that out.

Now, I think we are going to have to talk about a recent case called *Bell vs. Wolfish*. And *Bell vs. Wolfish* is the case which says that prison administrators should be accorded wide deference in how they run their institution.

Now, counsel suggests other, what he states are reasonable alternatives. We would submit to the Court that that is not the test, even for a Constitutional violation. The test is not whether other reasonable alternatives existed, but whether or not the alternatives selected and used violated the Constitutional rights of the inmates.

Now, clearly — and I don't dispute Mr. Mechanic's statement — the officers could have taken a chance with Officer Fitts' life. They certainly could have attempted to use gas. They could have attempted to continue to talk. We could probably in hindsight talk could haves for the rest of the week. But this isn't a could have case. The case is, was the action taken reasonable under the circumstances?

Now, I agree in a sense that four expert witnesses were called, and one of them I would agree still is an expert witness who ought to be considered, the expert witness who suggested as an alternative that you

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simply shoot down the tier past 54 people and pick off anybody going to cell 201. I think those kinds of suggestions ought to be discounted out of hand. But the point is not so much were other alternatives available, but was the one selected reasonable under the circumstances, and you have to strike a balance. You have to look at what you are

trying to save; what the risks are. And in that circumstance we have to look at Superintendent Cupp, who evaluated the circumstances as they were relayed to him, said, "We are going to have to use shotguns; the situation is serious, but let's not kill anybody. Shoot low."

Then we have to look at the weapons selected. The shot was not a "00" buck, although you would find — well, I won't mention it because it's not in the testimony, but it was not "00" buck. They didn't go head hunting. They simply went in, applied force, saved the hostage, and that was it.

Mr. Albers had already been shot at that point. Now, a substantial amount of testimony came in over our objection about what happened to Mr. Albers afterwards, and subsequently, apparently, by way of concession, Mr. Mechanic admits it has nothing to do with the case because there are four named defendants, and there is not one particle of evidence pointing to any

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of those defendants as to how Mr. Albers was handled afterwords. [*sic*]

That issue, I would submit to the Court, is not an issue in this case. There is no claim that the defendants didn't act reasonably in arranging for medical treatment. There is no claim they had direct supervisory responsibility. In fact, the only evidence in the record is even before they went in with weapons they had ambulances waiting at the institution to take care of the injured. They had technicians included in the group that was going in to assist the wounded inmates.

Medical treatment is there almost as fast as the hostage is rescued. And so while there may be a complaint — Mr. Albers testified that some officer drug him down the steps — he didn't say it was any of these four people. And there is a claim that he lay out there too long. But he doesn't claim any of these four people left him.

And so we simply have to look at what decision is actually being challenged, and the challenged decision is, one, Mr. Cupp authorized the use of force within the institution — shotguns. How did he authorize it? Shoot low. What kind of force did he authorize? Non-deadly load, at least when shot in the

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right area. Two, Mr. Keeney; what was his involvement? He ordered — all he did was basically he was the relay man. He relayed the authority to shoot low. He participated in the evaluation and agreed with the decision. I don't think any liability can be premised upon an agreement with a decision. What's Mr. Whitley's role? Mr. Whitley gave the order, "Shoot anyone heading toward cell 201, and shoot low," and the question is whether or not there is any evidence that can go to the jury that those instructions were unreasonable to the extent they violated Constitutional rights, and we would submit that they aren't.

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THE COURT: All right. I'm prepared to make a decision in this case at this time.

In this very tragic case a man was shot through the leg, a very serious injury. I'm not permitted to evaluate this case in the light of sympathy to the defendant or, really, the conduct that the defendant himself or the plaintiff himself engaged in. I have to evaluate this case in the light of the conduct of the defendants under the circumstances at the time and not in hindsight in determining whether or not there is any substantial evidence from which a jury could conclude that there was a cause of action or violation of constitutional rights.

In that regard it's an extremely complex case. Not one single case has been cited to the Court involving a charge of violation of constitutional rights during the actual progress of a riot. Some cases have been cited where constitutional violations occurred after a riot was over, the Attica case and other cases.

We are involved here with a situation in which the uncontradicted facts are that the prison authorities had in their belief — and appropriately, in my judgment, no question about it — a very major problem. There were 200 inmates in Cell Block A; Fitts was a hostage. The leader, or apparent leader, of the riot, was armed with a knife; was threatening to kill Fitts if any attempt was

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made to assault the position.

A barricade was thrown up, and an uncertain number of men, a minimum of six men or more armed with other clubs and weapons. Inmates fighting, one inmate injured. The

uncontradicted facts are that Mr. Klenk had told Mr. Whitley that the inmates had killed one man, that they were going to kill the rapos and other classifications of inmates.

It's easy to argue in hindsight in light of the way that this insurrection was put down, that this force wasn't necessary, but prison authorities are schooled in this manner. They have to be given some leeway, as the Wolfish case indicates. Prison authorities must be given reasonable latitude in supressing [*sic*] matters of this sort. If it were left to the courts, the lawyers, to supress [*sic*] these types of riots I'm not sure that we would ever get it done the way we move in our speed. The prison authorities — these men, the uncontradicted record is in this case that these men included men who had been convicted of murder, armed robbery, rape, assault with dangerous weapons.

While it was an onerous situation, I'm impressed — and I don't think there can be any second guessing the testimony of the plaintiff's expert or defendant's [*sic*] expert witness — that these men, under given circumstances, are

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capable of doing anything. We already have evidence uncontradicted in this case that two inmates had joined to beat one inmate. We have uncontradicted evidence that other inmates were asking for assistance. We have a recognition that this type of explosive situation can change and degenerate rapidly.

Under these circumstances I'm asked to submit this case to a jury to determine in spite of everything we tried to do in

hindsight, have this jury determine whether there were other options or whether this conduct was reasonable.

I want to analyze that just a little bit and give my reasons for granting the motions for directed verdict on behalf of all the defendants.

It appears to me that the uncontradicted evidence is that Captain Whitley had a very good knowledge of what was going on, at least with Mr. Klenk in that area. There is simply no evidence of retaliation. The whole evidence in this case in that the effort was to obtain the release of Mr. Fitts. Mr. Fitts was located in a tier upstairs in 201. The orders that Captain Whitley gave to shoot any man who started up the stairs toward Room 201, in my determination, simply cannot be second guessed by a jury under the circumstances as we sit here in this courtroom.

He went in there unarmed to attempt to subdue

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Mr. Klenk, who had a knife. It's uncontradicted that Mr. Klenk carried that knife right to Room 201 of the floor before he was subdued by Captain Whitley. The knife was found on the floor. The evidence is clear that certainly Fitts's [*sic*] life was in danger if Captain Whitley had been stopped, and hindsight and the fact that he was not stopped doesn't affect the order he gave earlier to shoot anybody who started up those stairs towards Room 201.

I am sympathetic to the plaintiff in this case. I'm not judging his conduct, even though it's clear from the uncontradicted evidence that he knew where he should have

been. He may very well have had some reasons to try to help out in connection with this matter. But the fact is, there had been a warning given. The Court can take judicial notice of the fact that when a riot such as this is going on, every prisoner knows that he should be in his cell and not out contributing or adding to the riot.

Captain Whitley was faced with a number of men disarming Klenk, and there is no way for him to know under what circumstances that some other inmate was going to become brutal, assaultive under those circumstances. Many men had engaged in the destruction of property. Many men were worked up. While there is evidence that the demonstration was quieting down, the simple fact is that the fact it was quieting down doesn't necessarily mean that

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it's over, given an incident can occur, and here is a man with a knife who says he will kill or cut the throat of the hostage if any effort is made. The longer it goes on the more clearly dangerous it is.

Under the circumstances, I do not believe there is any evidence from which this jury could conclude under the facts of this case that there is any constitutional violation.

I'm impressed with the language of Judge Friendly in *Johnson against Glick* in this case that in determining whether the constitutional line has been crossed a court must look to such factors as the need for application of force, the relationship between the need and the amount of force that was used, the extent of injury if inflicted, and whether the force

was applied in good faith effort to maintain or restore discipline or, on the other hand, maliciously and sadistically for the very purpose of causing harm.

I find no substantial evidence from which the jury could conclude that under analyzing all of those factors this case should be decided on behalf of the plaintiff.

With respect to the pendent claims, it's also my determination, even on a negligence basis, that the same considerations apply. Negligence has to be evaluated in the light of the particular circumstances at the particular

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time, and not in hindsight. That is true in Oregon, and under the circumstances, applying the analysis that I have made to the evidence that's been introduced in this case, I find no basis for submitting the matter on a negligence theory.

Irrespective of that, I'm satisfied that the Oregon Legislature did have the authority and did grant the immunity to the agents of the State of Oregon in this riotous situation under the Oregon statute. If the constitutionality of that statute is under attack, notice is required to be given and that matter has to be submitted. I'm not satisfied it is unconstitutional, and I'm satisfied that under that statute there is immunity with respect to the pendent claims.

I want to say very briefly that analysis of the expert's [*sic*] testimony on behalf of the plaintiff not only persuaded me that there is no substantial evidence from which the jury could conclude that this conduct was appropriate, but that there

were no reasonable alternatives. The suggestion certain formations should have been used and certain command decisions should have been made fall completely flat as I evaluate this. The time was an element. The superintendant [*sic*] was consulted, kept in part and — I withdraw that.

Captain Whitley consulted with a number of people,

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was in and out of that cell, gave orders that I don't believe the jury could conclude were inappropriate under the circumstances.

I think we also have to take judicial notice of the fact that when you have a riot going on at a prison with a start such as this, the extent to which it can move very rapidly, is something that we here in this courtroom simply cannot conceive of. We don't know what was going on, and neither do the prisoners know what was going on in Cell Block C, where the uncontradicted testimony is that there was more trouble starting, so I think it's necessary for the prison authorities to supress [*sic*] it promptly.

The fact that the plaintiff was involved is unfortunate. If his motives were good in coming down there, it's an unfortunate circumstance, but I do not believe it changes the fact that there is simply no evidence from which this jury could conclude that the conduct of the defendants was inappropriate under the circumstances.

Because of the nature of this case and because I am deciding it from the pressure of other matters at this time without even a half a day's deliberation, without any tran-

script of the record, in an effort to expedite this matter towards appeal, if appeal is appropriate, I'm going to reserve the right to issue a written opinion in more detail.

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The comments I have made are to avoid having lawyers prepare oral arguments tomorrow when the motion is going to be granted. I gave some thought to deferring and studying the matter overnight, but this would have meant unnecessary preparation by the lawyers. So that's my decition. [*sic*] The motions for directed verdict are granted. The jury will be advised tomorrow morning at 10:00, and I will not enter a judgment until I have issued a more formal decision.

Is there anything further at this time?

MR. MCALISTER: No (indicating)

THE COURT: If not, we are in recess.

OPINION OF NINTH CIRCUIT COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 to App-14 of the printed petition for certiorari]

OPINION OF DISTRICT COURT FOR THE DISTRICT OF OREGON

[Opinion set forth in full as Appendix B, pages App-15 to App-40 of the printed petition for certiorari]

No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROL WHITLEY, et al.,

Petitioners,

v.

GERALD ALBERS

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
ROBERT M. A[illegible]NSON
Assistant Att[illegible] General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Is the Eighth Amendment prohibition of cruel and unusual punishments violated, so as to expose prison officials to liability for damages under 42 U.S.C. § 1983 for their use of deadly force in quelling a prison riot, when some evidence, viewed in a light most favorable to an injured prisoner, establishes nothing more than an unprivileged common law battery?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is under review are: Gerald Albers (respondent herein); Harol Whitley, individually and as Assistant Superintendent of the Oregon State Penitentiary (OSP); Hoyt C. Cupp, individually and as Superintendent of OSP; J.C. Keeney, individually and as Assistant Superintendent of OSP; and Robert Kennicott, individually and as a corrections officer at OSP, (petitioners herein).

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The opinion of the Ninth Circuit Court of Appeals is reported as *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984), (P.C., App. A).[1] The opinion of the United States District Court is reported as *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982), (P.C., App. B).

JURISDICTION

The Ninth Circuit's opinion was dated and filed on October 1, 1984. The judgment under review was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari was timely filed on December 31, 1984, and allowed by this Court on June 10, 1985.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV provides in pertinent part:

> Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The Civil Rights Act of 1871 (42 U.S.C. § 1983) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or

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[1] As used in this brief, the abbreviation "P.C., App." refers to the appendix to the petition for writ of certiorari.

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Respondent Albers, an inmate at the Oregon State Penitentiary (OSP), filed a complaint in the United States District Court for the District of Oregon under 42 U.S.C. § 1983, pursuant to 28 U.S.C. § 1343. Albers sued for money damages from the four state penitentiary officials who are the petitioners in this Court: Harol Whitley, the security manager of the facility; Hoyt Cupp, the superintendent; J.C. Keeney, the assistant superintendent; and Robert Kennicott,[2] a corrections officer. Specifically, Albers sought damages for injuries he sustained when he was shot in the knee by defendant Kennicott while prison officials were quelling a prison riot at OSP.[3]

On June 27, 1980, Albers was a prisoner housed in Cellblock "A" at OSP, a maximum security prison. (J.A. 13, Tr. 277). The cellblock houses over 200 inmates. (Tr. 55). During the evening several inmates in the cellblock became agitated by what they viewed to be mistreatment by prison guards of other inmates being escorted through the cellblock. (J.A. 14-15). An early "cell-in" order was given. Some inmates resisted the cell-in order and began to

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[2] In the Complaint and in all succeeding documents, this defendant's name was spelled Kennecott. *See* J.A. 2. The proper spelling is Kennicott.

[3] At trial in the District Court, the parties entered into a partial factual stipulation that was read to the jury by the trial judge. (Tr. 53-60). The stipulation is reproduced at J.A. 13-18. All facts set out in the stipulation and in the Statement of the Case are cited herein as "J.A. ____." Also, specific testimony, relating to the officials' decision to use physical force to quell the prison riot and to expert opinions concerning the use of force in this case, is further set forth in Appendix A of this brief.

break furniture. (J.A. 15). Inmate Richard Klenk, who Albers thought was high on "drugs or something" (Tr. 117), became particularly upset. (J.A. 15). After confronting two guards, Klenk assaulted one of them. (Tr. 489). The assaulted guard left the area to report the disturbance. (Tr. 489). The other guard was taken hostage by the inmates and moved to cell 201 on the second floor of the cellblock. (J.A. 16). Some fighting broke out among inmates. (Tr. 106-07, 374).

After prison authorities were notified of the disturbance, security manager Whitley went to speak with Klenk. (J.A. 15-17). Attempts were made to demonstrate that the inmates about whom the prisoners were originally concerned were unharmed. (Tr. 160). The disturbance, however, continued. (Tr. 370-72). Whitley checked the condition of the prison guard being held hostage and found him to be unharmed. (J.A. 16).

Whitley then began organizing an assault squad. (Tr. 372-73). At some point, prison officials discovered Klenk had a knife (J.A. 16), and they learned he had claimed to have killed one inmate and that others would die. (Tr. 372). Klenk also threatened to kill the hostage if prison officials attempted to regain control of the cellblock. (Tr. 231, 369).[4] Whitley returned to the cellblock to see that the hostage was still unharmed. (J.A. 16). He was told by other inmates that they would protect the guard. (J.A. 16-17).

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[4] Specifically, Klenk told Whitley:

> You get the TV in here, Channel 6, Channel 8. I'm running this goddamned place. I've got Fitts as hostage, and I will personally cut his fucking throat if you rush this block.

(Tr. 370).

Albers left his cell at an inmate's request to see whether he could aid in quieting the disturbance. (Tr. 110-11, 185-86). Albers asked Whitley if he would return with a key to the lower tier cells to allow prisoners on the lower tier, including several elderly inmates, to remove themselves from the commotion. Whitley said that he would return with the key. (Tr. 115-16). As Whitley left, he discovered that the inmates had constructed a barricade that limited access to the cellblock. (Tr. 373).

When the disturbance first broke out prison officials made a preliminary decision to respond with tear gas. (Tr. 213, 372-73). They then discovered that the inmates had moved and strengthened their barrier (Tr. 215, 373-74), making it impossible for more than one person at a time to enter the cellblock. (Tr. 373-74, 379). They also learned that the only other door had been blocked. (Tr. 350). Defendants believed that it would not be possible to put sufficient gas into the cellblock quickly enough to affect the rioters and to prevent hostile inmates from harming the hostage. (Tr. 379, 467, 499-500, 510-11). The prison officials discussed the situation and agreed that tear gas could not be used. (Tr. 374-75, 510-11).

Superintendent Cupp thereupon ordered Whitley to take a squad armed with shotguns into "A" block. (Tr. 511). The plan was for Whitley to talk to Klenk one more time and attempt to get the hostage freed without force. If that failed, Whitley would start over the barricade, and try to stop Klenk before he could get to the hostage. Three guards armed with shotguns would follow Whitley. (Tr. 355). The shotguns were loaded with number six birdshot. (Tr. 248). Their instructions were to fire a warning shot (Tr. 218, 375, 397, 458), then to shoot low at anyone going up the stairs toward cell 201

where the hostage was being held. (Tr. 218, 238-39, 248, 375, 397, 458).

Whitley, followed by the three armed guards, reentered the cellblock. There is evidence that Albers asked Whitley for the key he had requested. Klenk refused to release the hostage, and Whitley started over the barricade. Klenk took out a knife and headed up the stairs. (Tr. 376). Whitley screamed "shoot the bastards" (Tr. 118)[5] as he ran toward the stairs in pursuit of Klenk. The stairway was the only route to the cell where the guard was held hostage. (Tr. 227). It was also the only route by which Albers could return to his own cell. (Tr. 227).

Warning and second shots were fired. (J.A. 17). Whitley chased Klenk to the upper tier and subdued him, with the help of several inmates, outside the door to the cell where the hostage was being held. (J.A. 17). Meanwhile, Albers was shot in the knee by Kennicott when Albers ran up the stairs behind Whitley. (J.A. 17).

The hostage guard was released unharmed. (J.A. 18). One other inmate was shot on the stairs (Tr. 225), and others on the lower tier also were injured by gunshot. (Tr. 526).

At trial before a jury, Albers presented, *inter alia*, two experts who testified that other measures, less drastic than those taken by the prison officials, could have been used to

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[5] In deposition testimony introduced by the plaintiff, Whitley testified:

> I was screaming, "Shoot Klenk; shoot that god-damned Klenk."
>
> . . . .
>
> [Klenk] had a knife, he threatened to cut a throat. He pulled a knife out and started off for the stairway. I thought if I screamed loud enough I would scare him enough that he would run past the cell. I thought if I was right behind him hollering, "Shoot him," he would go beyond the cell.

(Tr. 231.)

quell the disturbance. Lou Brewer characterized the actions taken by defendant prison officials as deadly force, and stated his opinion that deadly force was excessive. (Tr. 266). He testified that a number of alternatives to deadly force could have been employed, including communicating with Klenk (Tr. 262, 279), using gas, riot batons and shields (Tr. 264), and taking a direct disabling action against Klenk. (Tr. 266). He acknowledged, however, that riot batons could have caused death or permanent disability (Tr. 289), and he was unable to estimate the time it would have taken for gas to be effective in A Block. (Tr. 283-84).

In the opinion of plaintiff's expert Lee Perkins, the defendants were "possibly a little hasty in using the firepower on [the inmates]." (Tr. 314). He suggested as alternate actions the use of riot formations and entry through a door into the second tier (Tr. 311), or storming the barricade and sealing off the stairwell. (Tr. 313). Mr. Perkins also suggested that a rifleman could have been posted to "immobilize" anyone going to cell 201 "with one shot." (Tr. 311). The fact that it would have been necessary to shoot past as many as fifty inmates to do so did not change his view. (Tr. 316).

Defendants' experts controverted the testimony of Albers' experts. Defendants' expert W. James Estelle testified that the performance of defendant prison officials was consistent with modern accepted prison riot control procedures. (Tr. 437). He was of the opinion that gas would have been ineffective because there was no way to get the massive amount of gas needed into the cellblock before the rioters could have reached the cell where the hostage was held. (Tr. 439). Estelle testified that, given the circumstances of this case, verbal warnings would have further endangered the hostage by alerting the principal inmate rioter and his supporters. (Tr. 438, 450). Mr. Estelle stated his opinions that the use of shotguns

under instructions to shoot any inmate heading for cell 201 was both reasonable and necessary under the circumstances, and that he would have difficulty giving an example of "more courageous and appropriate action by a group of corrections personnel under that kind of trying circumstances." (Tr. 437).

Defendants' expert Roger W. Crist agreed that the defendants' use of firearms was reasonable and that less forceful alternatives were not reasonably available. (Tr. 552). Mr. Crist testified that the option of attempting to talk to the rioters had been exhausted as a reasonable alternative. (Tr. 547, 558-59).

In Mr. Crist's view, an attempt by Whitley individually to disable Klenk would have had the probable effect of causing other inmates to jump in on Klenk's side. (Tr. 550-51). The narrow space for entry and the barricade combined, in Mr. Crist's opinion, to make it impossible to get sufficient manpower in quickly enough to make riot batons practical. (Tr. 551). Mr. Crist agreed with the defendants and Mr. Estelle that verbal warnings before coming in with force would have tipped the officials' hand about their intention. Mr. Crist testified that under the circumstances of this case the warning shot was much more effective than a verbal warning would have been. (Tr. 554, 556, 563).

Mr. Crist endorsed the order to shoot inmates headed toward cell 201. He characterized the instructions to shoot toward those headed to cell 201 as reasonable "particularly in view of the fact that the orders were to shoot low, so the intent was not to kill anyone, but to provide the least amount of damage and still control the situation." (Tr. 552). He described the defendants' response as "almost a textbook model" of modern accepted prison riot control procedures. (Tr. 553-54).

At the conclusion of the trial defendant prison officials moved for a directed verdict on the basis that plaintiff Albers' evidence was insufficient to permit the jury to find a violation of Albers' Eighth Amendment right not to be subjected to cruel and unusual punishment. The district court granted the motion on this ground and, alternatively, on the ground that defendants were immune from suit. The court entered a written decision. *Albers v. Whitley*, 546 F. Supp. 726 (D. Or. 1982).

Respondent appealed to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The Ninth Circuit reversed the judgment of the district court. *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984). It held that Albers presented sufficient evidence of an Eighth Amendment violation. It ruled that, based on the expert testimony presented, "a jury could have concluded that the prison officials' 'riot plan' was hopelessly flawed and that the use of deadly force against Albers was unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." 743 F.2d at 1376. The Ninth Circuit also addressed petitioners' qualified immunity claim. It held that upon retrial, if a jury should conclude that Albers was subjected to cruel and unusual punishment, the defense of qualified immunity would not be available to petitioners. *Ibid.*

SUMMARY OF ARGUMENT

The issue for this Court's resolution is under what circumstances, and by what test, the selective use of potentially deadly force to stop a prison riot and save a hostage's life violates the Eighth Amendment's Cruel and Unusual Punishments Clause. A corollary issue is whether the defendant prison officials are entitled to immunity.

(1)

In resolving the plaintiff inmate's claim of an Eighth Amendment violation, the Ninth Circuit Court of Appeals applied an analysis that equates the constitutional inquiry with the inquiry that would be made in a common law assault and battery case. The lower appellate court's focus was on the existence of less forceful alternatives that arguably could have been used to regain control, and whether the force used was therefore unreasonable or excessive in relation to the danger. Under the Ninth Circuit's decision, a jury is free to disagree with the judgments made by prison administrators and to disregard wholly all evidence of their soundness. On the basis of differing opinions among corrections experts about what riot control plan is best, a jury can find, in the Ninth Circuit's view, that the riot control plan followed resulted in unconstitutionally cruel and unusual punishment. The Ninth Circuit was plainly wrong.

Although we have no disagreement that the Eighth Amendment is the proper constitutional basis for the plaintiff's challenge, we disagree that the evidence was adequate to create a jury question on whether there was a violation. Not all aspects of incarceration constitute punishment, even those which may be harsh. Moreover, not all punishments are constitutionally offensive. The Eighth Amendment proscribes only "cruel and unusual punishments," and as such it marks an outer boundary. The prohibition properly extends to the wanton infliction of unnecessary pain, and to serious injuries or deprivations of basic human needs that result from deliberate indifference. To be unnecessary in the constitutional sense, the action taken by prison officials must be such that no one would suggest it has any penological justification. To be wanton or a consequence of deliberate indifference, the pain must be inflicted purposefully for the sake of inflicting pain, or inflicted with such extreme indifference

that the mental state of the actor fairly equates with punitive intent. To require less is to elevate pure accidents and common civil torts to the status of "cruel and unusual punishments," a proposition that this Court soundly has rejected.

The constitutionality of measures taken to control a riot cannot be evaluated merely by reference to the possible use of less forceful alternatives, as the Ninth Circuit's tort-like standard inevitably invites. A prison administrator is not required to select the least restrictive, as opposed to most effective, means of responding to a life-threatening emergency, and inmates have no constitutional right to be free from all but the least drastic measures conceivable to control a prison riot. The correct inquiry is not whether in someone else's estimation less stringent measures would be equally effective, it is only whether the actions taken were constitutional. If the force used made a measurable contribution to a legitimate penological objective, and did not sweep so far beyond that objective to allow the inference of a punitive intent, there can be no constitutional objection to its use.

In undertaking this analysis, the scope of a court's review must be carefully circumscribed. The task of running prisons and making the wide-range of judgments called for in responding to security concerns is expressly committed to the legislative and executive branches of government. Particularly in the context of an official response to a prison riot, a court must limit its inquiry to the demands of the constitution and not be tempted to second-guess prison administrators about what plan is best. Development of a riot-control plan calls for substantial familiarity with the inmates themselves and the physical structure of the institution. It requires training and experience in riot control techniques. Delicate predictions and informed decisions must be made swiftly in the attempt to accommodate the conflicting safety interests of the hostage,

prison personnel, and the inmates. Prison administrators therefore must be accorded considerable latitude and deference. Unless their decisions are shown conclusively to be wrong, they should not be declared unconstitutional.

Analyzed under proper constitutional standards, the evidence in this case was inadequate even to create a jury question on the existence of a violation. Plaintiff did not claim, and the evidence did not suggest, that the actions taken by prison administrators were for any motive other than the proper purpose of regaining control and saving the hostage. The most plaintiff was able to establish was that corrections experts hold differing opinions on how best to respond to riots. Plaintiff's entire case was predicated on the existence of less forceful means that, in the judgment of plaintiffs experts, should have been used in response. At best, plaintiff only established that the question of the propriety of the action taken by the defendant officials was a classic matter for the informed judgment of the responsible prison administrators. Plaintiff failed altogether to provide proof that the actions taken made no measurable contribution to prison security or that they were otherwise wholly without penological justification. The district court's judgment was correct, and the Ninth Circuit's reversal of that judgment and the rationale of its decision were patently in error.

(2)

The Ninth Circuit not only misconstrued the Eighth Amendment, it also misanalyzed the state prison officials' claim of qualified immunity. Its decision to strip petitioners of their entitlement to immunity cannot be squared with this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

First, the Ninth Circuit court erroneously concluded that if state prison officials violated a plaintiff inmate's Eighth Amendment rights when they used physical force in quelling a

prison riot, they necessarily lost their right to claim qualified immunity. This astounding conclusion was based upon the court's circuitous reasoning that the analysis of an Eighth Amendment claim and of a qualified immunity claim so overlap that findings on the two issues are "mutually exclusive." This misanalysis flies in the face of *Harlow*'s teaching that a defendant's immunity claim is conceptually distinct from the merits of a plaintiff's claim that his constitutional rights have been abridged. Contrary to *Harlow*, its precursors and its progeny, the court of appeals held that defendant prison officials would lose their immunity by their deliberate indifference to a right, without first determining whether the right to which defendants allegedly were indifferent was "clearly established."

Thus, the Ninth Circuit failed to undertake the crucial inquiry whether the plaintiff inmate's claimed constitutional right to be free from the use of deadly force to quell a prison riot and to rescue a hostage had been clearly established. The Ninth Circuit majority reversed the district court judge and ignored the court of appeals dissenter, both of whom correctly pointed out that no prior federal court decision had countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance. Blinded by its merger of the immunity claim with its resolution of the merits, the majority failed to perceive the significance of this fact. No inmate right to be free from deadly force in suppressing a prison insurrection had been clearly established; nor had an inmate's right to be free from all but the least amount of force conceivable been established by any prior authority. The Ninth Circuit's majority decision is the first to create such rights.

By holding the defendants accountable for allegedly violating a right the court itself first recognized in their case, the

Ninth Circuit violated yet another precept of *Harlow*. As this Court's recent decision in *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806, 2820 (1985) reiterates, *Harlow* rejected such "hindsight reasoning on immunity issues" and "teaches that officials performing discretionary functions are not subject to suit when . . . questions [about the legality of measures taken by them] are resolved against them only after they have acted." The decisions of other circuit courts, upon which the Ninth Circuit relied in crafting its new and, we submit, erroneous Eighth Amendment standard are so factually distinguishable and too untimely under *Harlow* and *Forsyth* to support a conclusion that the right discerned by the Ninth Circuit and allegedly violated by the defendants was clearly established in June, 1980.

In light of the dearth of settled authority, the disagreement between the district court and the Ninth Circuit, the divergence of opinion in the lower appellate court panel and this Court's exercise of its discretionary authority to review the substantive issue presented, defendants cannot be deemed to have violated a clearly established right. This Court should hold, therefore, that defendants were entitled to immunity, and reverse the contrary decision of the court of appeals.

ARGUMENT

I. Introduction

This case presents two critical aspects concerning the liability of prison officials for money damages under 42 U.S.C. § 1983. The State of Oregon has asked this Court to decide what standard of analysis applies to an Eighth Amendment claim of cruel and unusual punishment based on the use by prison officials of injurious and potentially deadly force in their response to an inmate riot. A corollary issue is whether, if an Eighth Amendment violation occurred, the defendant state prison officials are entitled to qualified immunity.

The Ninth Circuit Court of Appeals resolved these issues against the defendants. The State of Oregon sought review by this Court because the lower appellate court's decision stands as an unwarranted impediment to the ability of prison officials to carry out their responsibilities relating to internal prison security.

In this case, state prison administrators and officers at Oregon's largest maximum security prison faced an extremely volatile situation, an inmate riot in an open cellblock housing over 200 inmates. A prison guard was held hostage for over two hours by an armed inmate who repeatedly threatened to kill the guard as well as other inmates, and who reported that he already had killed one inmate. Several attempts by prison officials to negotiate the guard's release failed. The unsuccessful negotiations took place against a background within the cellblock of uproar and commotion which included fighting and threats among inmates, the destruction by inmates of most of the cellblock furniture, and the blocking and barricading of the cellblock doors to prevent inmates from leaving and prison officials from entering. Ultimately, the defendant prison officials were successful in quelling the riot and freeing the hostage with no loss of life, although some inmates, including plaintiff, were injured as a result of the force used by the officials.

Plaintiff filed suit under 42 U.S.C. § 1983, seeking money damages and claiming that the force used by prison officials violated his Eighth Amendment right to be free of cruel and unusual punishment. He presented experts at trial who testified to alternative and, in their judgment, less drastic means that they believed should have been used to attempt to stop the riot. Defendants also presented corrections experts. Those experts testified that the actions taken by the prison administrators were appropriate, and that the alter-

native precedures proposed by plaintiff's experts would have been less effective, ineffective or might even have aggravated the danger.

At the conclusion of the evidence, the district court granted the defendants' motion for directed verdict. The trial judge held that, even viewed in a light most favorable to plaintiff, the evidence of "excessiveness" of force did not rise to the level of an Eighth Amendment violation. 546 F.Supp. at 735. Alternatively, the district court directed a verdict for defendants on the ground that they were immune from liability. *Id.* at 737. The Ninth Circuit Court of Appeals disagreed on both points . It reasoned that the conflict in evidence on whether the force used was excessive was sufficient to raise a jury question on the existence of an Eighth Amendment violation. 743 F.2d at 1376. It also concluded that no qualified immunity defense would be available if an Eighth Amendment violation was found. *Ibid.* The decision of the Ninth Circuit significantly diluted both the meaning of the Eighth Amendment's prohibition against cruel and unusual punishments and the doctrine of qualified immunity. For the reasons set forth below, the Ninth Circuit's decision should be reversed and the district court judgment for defendants should be reinstated.

II. The Ninth Circuit Court of Appeals Adopted An Incorrect Eighth Amendment Analysis and Erroneously Exposed Defendants to Liability.

A. The Standard Employed by the Ninth Circuit Court of Appeals Equates With the Standards for the Common Law Tort of Assault and Battery and the Defense of Privileged Use of Force.

The Ninth Circuit's resolution of this controversy failed properly to accommodate the fundamental values of the Eighth Amendment and basic limitations on appropriate

judicial scrutiny. The lower appellate court ritualistically spoke in terms of "unnecessary and wanton infliction of pain" and "deliberate indifference," and it gave passing acknowledgment to the need to accord prison administrators "reasonable latitude" in determining the appropriate response to a crisis. 743 F.2d at 1374, 1375. In deciding plaintiff's Eighth Amendment challenge, however, the Ninth Circuit abandoned those principles. Effectively, the appellate court announced an evidentiary standard pursuant to which almost every Eighth Amendment claim arising from a prison riot must be treated as a jury question. Juries will be at full liberty to second-guess prison administrators and to find liability if they differ in their opinion of what action should have been taken.

The defect in the Ninth Circuit's reasoning was that it ultimately used an evidentiary standard for "excessiveness" that equates with what would be required in a common law tort case. The Ninth Circuit stated:

> In our view, a proper standard deems the eighth amendment to have been violated when the force used is "so unreasonable or excessive [as] to be clearly disproportionate to the need reasonably perceived by prison officials at the time." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 2683, 81 L.Ed.2d 878 (1984). Thus, if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was *unnecessary*, Albers' constitutional right would have been infringed. . . .

743 F.2d at 1375 (emphasis added).

The Ninth Circuit's opinion pointed to evidence that the riot was "subsiding" at the time of the official action as support for an inference that the force used was excessive. 743 F.2d at 1376. Although we disagree that the evidence supports this characterization,[6] it was not the essential

[6] Even viewing the evidence in the light most favorable to plaintiff, this

(Footnote continued on next page)

focus of the Ninth Circuit's opinion. The evidence upon which the panel majority concluded that an Eighth Amendment violation could be found was the testimony of plaintiff's experts.

The lower appellate court discussed and canvassed more extensively the conflict in the expert testimony on whether less drastic measures could have and should have been used to stop the riot. In reviewing that evidence, the court noted the testimony of Mr. Brewer that a verbal warning rather than a warning shot should have been given and that the use of deadly force was premature. The Ninth Circuit below also pointed to Mr. Perkins' testimony of possible alternative responses and his opinion that officials were "possibly a little hasty in using firepower" on the inmates. The Ninth Circuit then declared that it "was the jury's function to weigh the experts' testimony on the basis of each expert's experience, knowledge, and opportunity to observe." 743 F.2d at 1376. Thus, the Ninth Circuit held that from the evidence of alternatives involving a lesser degree of force, the jury could conclude that the riot plan was "hopelessly flawed" and that the use of deadly force was "unreasonable, unnecessary, improper and engaged in with deliberate indifference to his constitutional interests." *Ibid.*

This holding by the Ninth Circuit effectively grafts the common law tort standards for assault and battery and defensible use of force onto Eighth Amendment analysis. The inquiry for the jury in such a case is whether the degree of force used was unreasonable or excessive in relation either to real danger, or to danger reasonably believed to exist. To meet

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is a misleading characterization. At most, a trier of fact could conclude that the riot had quieted and the atmosphere of destruction had subsided. The danger was far from past: The hostage was still being held at knifepoint, Klenk still was threatening to take lives, negotiations had not proven fruitful, and the cellblock still was under inmate control. At best, the conflict was in stalemate.

this standard it must be shown that the actor considered whether lesser force would prevent the apprehended harm. *See*, Prosser and Keeton on Torts, §§ 19 and 20 (Fifth Ed. 1984); Restatement (Second) of Torts, § 70(1), comments b and c. *Cf. Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (Damages sought for death and injuries from gunfire used by police to stop student riot).

Thus, the Ninth Circuit created a jury question under the Eighth Amendment on precisely the same basis that a jury question would be created for a tort action. The unreasonableness or excessiveness of harm is determined in relation to less forceful alternatives. The jury is free to disagree with the judgment of prison administrators on the security justifications for the use of force, and the jury may elevate the professional opinions they prefer over those they find less persuasive. Under the Ninth Circuit's analysis, wherever there is disagreement among corrections experts about the best plan for response to a riot, and wherever an inmate is injured by the response made by the responsible administrators, a jury is free to find an Eighth Amendment violation.

The Ninth Circuit's analysis unquestionably is wrong. This Court's jurisprudence establishes that the Eighth Amendment standard for "cruel and unusual punishments" is much more demanding, and that the role of courts and juries in reviewing the security actions of prison administrators is much more limited.

B. The Eighth Amendment Standards Recognized by this Court Are More Rigorous Than the Common Law Tort Standard Adopted by the Ninth Circuit.

1. *Applicability of Eighth Amendment Cruel and Unusual Punishments Clause.*

We have no quarrel with the proposition that where, as here, a lawfully committed prison inmate asserts that his

personal security has been unconstitutionally infringed by prison officials, the claim properly is analyzed under the Eighth Amendment Cruel and Unusual Punishments Clause. A prisoner's conviction follows a full panoply of procedural protections. Compliance with those procedural protections and the fact of conviction entitles the state to classify an individual as a "criminal" and to incarcerate him. *See Ingraham v. Wright*, 430 U.S. 651, 669 (1977). Given a valid conviction, an inmate's general liberty interest, which includes the right to personal security,[7] is "extinguished" to the extent that the state may confine him in any of its prisons, even those most restrictive; the inmate then is subject to the rules of the prison system so long as the conditions of confinement do not otherwise violate the constitution. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).[8]

That is not to say, however, that an inmate retains no protected liberty or personal security interest. The Eighth Amendment Cruel and Unusual Punishments Clause serves as the principal constitutional reservoir of that interest. Unlike the provisions of the Constitution of general application (*e.g.*, equal protection, religious exercise, free speech), the Eighth Amendment specifically is directed to those convicted of crimes. *Cf. Ingraham v. Wright*, 430 U.S. at 669-71. Upon conviction, a sentenced inmate may be

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[7] *Ingraham v. Wright*, 430 U.S. at 673; *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982).

[8] Although the liberty interests deriving from the Due Process Clause itself are extinguished by the fact of lawful criminal conviction, the procedural protections of the Due Process Clause operate with respect to protected liberty interests created by state law or marked by other provisions of the Constitution. *Compare Meachum v. Fano*, 427 U.S. 215 (1976) *with Wolff v. McDonnell*, 418 U.S. 539 (1974).

punished, although that punishment may not be cruel and unusual. *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979). Thus, the scope of a convicted inmate's constitutionally protected personal security interest is marked by the boundaries of the Cruel and Unusual Punishments Clause.[9]

This Court has not hesitated to test the constitutionality of prison conditions, disabilities or restraints that infringe personal security or other physical liberty interests under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Physical brutality against prison inmates has been viewed as "part of the total punishment to which an individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny." *Ingraham v. Wright*, 430 U.S. at 669. Disabilities and suffering from unmet medical needs similarly are within the purview of the Eighth Amendment. *Estelle v. Gamble*, 429 U S. 97 (1976). Because confinement in a prison is itself a form of punishment, the conditions of that confinement cannot exceed the limits imposed by the Eighth Amendment. *See Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).

For these reasons, the Eighth Amendment prohibition against cruel and unusual punishments is the proper constitutional source of protection for an inmate injured by force used in a prison riot. That acknowledgment only begins the critical inquiry; the question remains whether the Eighth Amendment guarantee has been violated.

2. *Interpretation of the Cruel and Unusual Punishments Clause.*

The language of the Eighth Amendment is straightforward. It prohibits the infliction of punishments which are

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[9] We recognize that other provisions of the Constitution, such as the search and seizure protections of the Fourth Amendment, safeguard more narrow personal security interests (*e.g.*, privacy). We refer here only to the more generalized liberty/personal security interests of the due process clause.

"cruel and unusual." But as this Court has observed, the nature of the clause is not exact. Its words are not precise, and there is very little evidence of the framers' intent in including the clause among the restraints on government enumerated in the Bill of Rights. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 258 (1972) (Brennan, J., concurring). For these reasons, the ban on cruel and unusual punishments has been identified as "one of the most difficult to translate into judicially manageable terms." *Id.* at 376. (Burger, C.J., dissenting). However, the Eighth Amendment jurisprudence of this Court has been plentiful, particularly during the past two decades. As a consequence, certain general principles relevant to government's authority to impose punishment for criminal conduct have become settled.

It is clear, first of all, that not all actions constitute punishment in the constitutional sense. Certainly that is true in the context of challenged legislative action. Statutes that impose disabilities for reasons traditionally associated with punishment — that is, to reprimand the wrongdoer or to deter others — properly come within the scrutiny of the Eighth Amendment; statutes that impose disabilities to accomplish some other legitimate governmental purpose do not. *Trop v. Dulles*, 356 U.S. 86, 96 (1958). *See generally Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Similarly, not everything that happens to an inmate while in prison is properly characterized as punishment, even though the fact of his incarceration unquestionably is punitive in nature. Obviously, rehabilitative training, sound medical care, recreational athletic programs and the like benefit an inmate, and impose no disability whatsoever. But even less desirable aspects of prison fall short of the constitutional

notion of punishment, such as unpleasant conditions which do not cause pain or result in deprivations of basic human needs. *See generally Rhodes v. Chapman*, 452 U.S. at 347-48.

It is obvious from the literal text of the clause that not all punishments are constitutionally offensive. The state, after a person validly is convicted of a crime, has the power to punish. The question under the Eighth Amendment is whether, in the exercise of that power, the government has been "tempted to cruelty." *Weems v. United States*, 217 U.S. 349, 373 (1909). Only those punishments which rise to the level of cruelty are unconstitutional. *Ibid. See generally Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1946).

In its historical context, the Eighth Amendment proscription against cruelty has been perceived as protecting prisoners from " 'torture' and other 'barbarous' methods of punishment." *Gregg v. Georgia*, 428 U.S. 153, 170 (1976). But the words of the clause have been interpreted "in a flexible and dynamic manner," with the result that the reach of the Eighth Amendment prohibition has been extended beyond its earlier historical applications. *Id.* at 171; *Rhodes v. Chapman*, 452 U.S. at 345. *Cf. Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) ("The standard itself remains the same, but its applicability must change as the basic mores of society change"). Accordingly,

> [t]oday the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," . . . or are grossly disproportionate to the severity of the crime, ... Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification" . . . .

Rhodes v. Chapman, 452 U.S. at 346 (citations omitted).

In the scrutiny of punishments which allegedly involve the "unnecessary and wanton" infliction of pain, the Court's

decisions emphasize that the Eighth Amendment prohibition draws an outer boundary. The same is true of punishments alleged to be grossly disproportionate to the conduct for which they are imposed. The Cruel and Unusual Punishments Clause is not appropriately used to arbitrate between competing legislative or penological philosophies about correct methodology. *See, e.g., Weems v. United States*, 217 U.S. at 378-79, 381; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 470 (Frankfurter, J., concurring). The constitutional concepts of "unnecessary" infliction of pain and "gross disproportionality" are more absolute than they are relative; in a constitutional context they are not established, as they are in the common law tort area, by the availability of or comparison to less harsh alternatives. The Eighth Amendment therefore "[does] not require a legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U.S. at 175. Four members of the Court expressed the same view in *Furman v. Georgia*:

> While the cases affirm our authority to prohibit punishments that are cruelly inhumane . . . and punishments that are cruelly excessive in that they are disproportionate to particular crimes . . . the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious.

408 U.S. at 451 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun and Rehnquist, J.J.) (citations omitted). Similarly, the fact that experts knowledgeable about prison administration urge the feasibility of less harsh or more desirable prison conditions does not establish that more harsh conditions violate the Eighth Amendment; such policy views simply do not set constitutional minima. *Rhodes v. Chapman*, 452 U.S. at 348 n. 13.

The Eighth Amendment proscribes the infliction of pain which "no one suggests would serve any penological purpose." *Estelle v. Gamble*, 429 U.S. at 103. Only then is suffering "unnecessary" within the meaning of the Cruel and Unusual Punishments Clause. Similarly, where a punishment is assailed as "grossly disproportionate," it is not unconstitutional unless it "serves no valid legislative purpose," *Furman v. Georgia*, 408 U.S. at 331 (Marshall, J., concurring), or is "pointless" *id.* at 279 (Brennan, J., concurring), or "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In short, a punishment to be cruel and unusual must be action which is more or less universally condemned, and not merely conduct about which opinion is fairly divided. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 469-70. (Frankfurter, J., concurring).

The concept that the Eighth Amendment proscribes punishment that is more or less universally condemned is consistent with the concept that the Eighth Amendment reflects standards of decency within our society, and that those standards change as society matures and evolves. *See Trop v. Dulles*, 356 U.S. at 101; *Weems v. United States*, 217 U.S. at 373. The essential point is that the Eighth Amendment is marked by currently accepted standards of decency, not predictions of what the standards may be in some future time.

Also consistent with the "evolving standards of decency" value that inheres in the Eighth Amendment is the recognition that pain, to be cruel and unusual punishment, must be inflicted intentionally, deliberately or through indifference sufficiently extreme to equate fairly with intent. In both its dictionary and ordinary meaning, "cruel" connotes the purposeful infliction of pain for the sake of inflicting pain.[10] Thus, this Court has repeatedly emphasized that, to be unconstitutional, a punishment must involve the unnecessary and *wanton* infliction of pain, *Gregg v. Georgia*, 428 U.S. at 173; the *gratuitous* infliction of suffering, *id.*, at 183; unnecessary *cruelty*, *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); "malevolence" or "purpose" in inflicting pain, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 463, 464; and *deliberate indifference* to physical suffering, *Estelle v. Gamble*, 429 U.S. at 104.

To abandon any requirement of an intentional mental state component or its equivalent for an Eighth Amendment violation is to equate pure accidents and common civil torts with cruel and unusual punishments. Negligently and accidentally inflicted pain is, almost by definition, "unnecessary" and without any penological justification. But this Court has soundly rejected the extension of the Eighth Amendment to such risks, which attend equally to life outside prison walls as well as within. In *Estelle v. Gamble*, in the context of a failure to provide medical treatment to an inmate, this Court was careful to point out that not every act of prison officials which results in pain or anguish is "on that basis alone to be characterized as wanton infliction of unnecessary pain." 429 U.S. at 105. Accordingly,

> an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amend-

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[10] Cruel is defined by one source as "disposed to inflict pain esp. in a wanton, insensate, or vindictive manner: pleased by hurting others . . ." Webster's Third New International Dictionary (1976).

> ment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 105-06. *See also Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 464-65 (second attempt at electrocution did not violate Eighth Amendment; failure of initial attempt was an "unforeseeable accident" and there was "no purpose to inflict unnecessary pain").

Several salient principles thus emerge from the Court's Eighth Amendment jurisprudence. The Cruel and Unusual Punishments Clause does not bar punishment, only certain punishments. Implicit in the clause is a recognition that punishment properly is part of an effective criminal justice system. But also reflected in the Eighth Amendment is the declared value that punishment which clearly goes beyond the legitimate aims of our justice system, and which is deliberately inflicted, is not to be tolerated. The infliction of pain for the sake of inflicting pain is proscribed.

Conceptualized in that fashion, the Eighth Amendment marks an outer perimeter of allowable conduct. Short of that line, a wide variety of punishments may serve legitimate criminal justice ends to varying degrees or with variable success. Within society, there may be disagreements about the propriety or desirability of specific punishments, and whether they adequately serve penological objectives. But the Eighth Amendment is not the arbiter of those disagreements. Its purpose is to reach only those punishments that clearly go beyond the outer mark.

3. *Parallel Principles of Analysis Under the Due Process Clause.*

Many of the same principles of analysis apply when the Eighth Amendment is inapplicable and the Due Process

Clause of the Fourteenth Amendment is the source of constitutional protection. In *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Block v. Rutherford* 468 U.S. ___, 104 S.Ct. 3227 (1984), this Court was presented with "cruel and unusual" punishment challenges to security measures followed in jails housing pretrial detainees. Both cases involved constitutional attacks on various institutional policies and practices designed to minimize drug and contraband smuggling into the jail by pretrial detainees. In *Bell*, this Court held that, because the detainees had not yet been convicted of any crime, the appropriate source of constitutional scrutiny was the Due Process Clause, not the Eighth Amendment, and that due process requires that a pretrial detainee not be punished. 441 U.S. at 535 and n. 16. *Accord, Block v. Rutherford*, 104 S.Ct. at 3231. Therefore, the pertinent inquiry in the evaluation of the constitutionality of the challenged conditions or retraints of detention was whether those disabilities "amount to punishment." *Id.* at 535. *Accord, Block v. Rutherford*, 104 S.Ct. at 3231.[11]

Bell and *Block* drew heavily from Eighth Amendment jurisprudence in announcing controlling principles. *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), discussed in *Bell v. Wolfish*, 441 U.S. at 537-39 and in *Block v. Rutherford*, 104 S.Ct. at 3231-32. The crucial inquiry in determining

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[11]The Eighth Amendment does not ban punishment *per se*; it forbids only cruel and unusual punishments. Nevertheless, in a challenge under the Eighth Amendment, it is appropriate to ask whether a condition or restraint constitutes punishment at all. We see no principle upon which that inquiry when made under the Eighth Amendment should differ meaningfully from the same inquiry under the Due Process Clause. At least two members of this Court, in separate opinions, have noted that the tests for applying these two provisions are in many ways identical. *Furman v. Georgia*, 408 U.S. at 359 n. 141 (Marshall, J., concurring). *Id.* at 422 n. 4 (Powell, J., dissenting).

if a disability is punishment was declared to be whether it is "imposed for purposes of punishment or whether it is an incident of some other legitimate governmental purpose." *Bell v. Wolfish*, 441 U.S. at 538. Absent proof of intent, the determination "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " *Ibid.* As the Court in *Bell* concluded:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' . . . Conversely, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

441 U.S. at 539 (footnote omitted).

Ensuring security and order within a detention facility unquestionably is a "permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both." *Id.*, 441 U.S. at 561. Therefore, actions taken by prison administrators that bear a "reasonable relation" to internal security are not punishment in any constitutional sense. Those inquiries, however, are not satisfied merely by consideration of less restrictive alternatives: Neither "reasonableness" nor "excessiveness" are judged in relation to options that others might adopt. *Block v. Rutherford* emphasizes the point that institutional administrators "are not [constitutionally] required to employ the least restrictive means available." 104 S.Ct. at 3234, n. 10. Thus, there may be many possible alternative responses to any given jail or prison security concern, all or several of

which may be reasonable. Within the range of reasonable alternative responses, one may be be less restrictive than the others, but that does not mean it is the only constitutionally permissible approach. *Bell v. Wolfish*, 441 U.S. at 554. The Constitution simply does not mandate the " 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." *Ibid.*

The decision in *Block* further underscores the point. The district court there acknowledged that many factors supported the institution's policy of not allowing contact visits. Nevertheless, it weighed the effects of a total ban against the security interests furthered and imposed an order requiring the jail officials to follow other procedures. In reversing, this Court held:

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility.

104 S.Ct. at 3234.

This holding highlights an important distinction in the analysis of challenges to prison security actions based on constitutional rights of general application as compared to an analysis of challenges based upon either the Eighth Amendment or Due Process Clause proscriptions of punishment. A prisoner retains rights secured by the Constitution's general provisions to the extent consistent with his status as a prisoner and the legitimate goals and objectives of a penal institution. *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977). There is, accordingly, a "mutual accommodation" between institutional objectives

and the provisions of the Constitution that are of general application. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). This approach in effect requires a balancing of an inmate's interest in exercising a particular right against the institutional interest to be furthered. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). Although institutional security concerns are sufficiently weighty that they often prevail in the balancing process, *see, e.g., Pell v. Procunier*, 417 U.S. 817 (1974), there are occasions when the weight of a general constitutional right will tip the scale in the opposite direction, *cf. Cruz v. Beto*, 405 U.S. 319 (1972).

In assessing a claim of unconstitutional punishment under either the Eighth Amendment or the Due Process Clause, there is no balancing to be done. The constitutional protection begins where the penological purpose ends. Thus, as *Block* points out, under a due process analysis the inquiry ends at the point at which it is acknowledged that security measures taken by institution officials are not without a basis in reason. The same should be true in the Eighth Amendment context. It is not appropriate to weigh the inmate's interest in being free of certain disabilities or restraints against the institution's interest in imposing them. Nor, for constitutional purposes, is it appropriate to consider less restrictive alternatives and declare a challenged decision "excessive" in relation to those alternatives. The inquiry is only whether the action taken is constitutional, not whether some other action would do as well.

4. *Limitations on the Court's Role in Reviewing Prison Security Measures.*

This case requires the Court to consider for the first time the limitations that the Eighth Amendment imposes upon actions taken by prison administrators relating to prison

security.[12] Although the Eighth Amendment issue is of first impression, the general context is familiar. This Court has decided a wide array of cases involving challenges to prison security policies and practices based on constitutional rights of general application, such as First Amendment rights. *See, e.g., Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) (free speech); *Pell v. Procunier*, 417 U.S. 817 (1974) (free speech and free press); *Cruz v. Beto*, 405 U.S. 319 (1972) (religion); *Bell v. Wolfish*, 441 U.S. 520 (1979) (due process). In all of these prison litigation cases, one principal point consistently is stressed: The scope of the court's inquiry is to be carefully circumscribed. Time and again, this Court has recognized that the task of managing prisons is extremely complex and difficult, and that the problems facing prison officials in the day-to-day operation of prisons are not susceptible to easy solutions. *See, e.g., Bell v. Wolfish*, 441 U.S. at 547. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 128 (1977); *Pell v. Procunier*, 417 U.S. at 827. The case law pragmatically has acknowledged that state prison administrators, unlike judges, are experts in the management and operation of state prisons. *See, e.g., Bell v. Wolfish*, 441 U.S. at 548; *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). The sensitivity of the decisions they are called on to make, and the recognition that there is no one solution for any of the many intractable problems that face prison administrators, has led to the conclusion that courts must accord prison administrators wide-ranging deference when their decisions and judgments are judicially challenged. This is particularly true with respect to prison security and efforts to

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[12] In *Rhodes v. Chapman*, the respondent inmates argued that "double-celling" created a potential for violence among inmates and possible rioting, and thus violated their Eighth Amendment rights. The Court found the claim to be speculative and unsubstantiated and therefore did not reach it. 452 U.S. at 349 n. 14.

ensure the safety of prison personnel, the inmates, and the public generally. *See Bell v. Wolfish*, 441 U.S. at 547. The simple reality is that prisons, especially maximum security facilities, house the most anti-social, violent and unpredictably volatile members of society. *See generally Hudson v. Palmer*, 468 U.S. ___, 104 S.Ct. 3194, 3200 (1984).

A second often recognized and equally compelling basis for a limited scope of judicial scrutiny stems from the need to preserve a proper balance in the relations among the separate branches of government. The responsibility for prison management is placed in the legislative and executive branches, and courts must bear in mind that their inquiries must reflect the demands of the Constitution rather than a judicial difference of opinion.

> [U]nder the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. at 562.

To ensure that judicial decisions reflect constitutional standards rather than a court or jury's different opinion on how a prison should be managed, this Court has insisted on a limited standard of judicial review in constitutional challenges to prison administration. Unless a court can say that prison administrators have been "conclusively shown to be wrong" in their assessment of the security needs of an institution, it is not the province of the courts to declare their actions or

policies unlawful. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. at 132. *Accord, Bell v. Wolfish*, 441 U.S. at 555.

The sound bases for judicial deference to prison administrators are even more compelling in the context of a prison riot and hostage situation. In no other circumstance is corrections expertise and experience more necessary; in no other setting is quick decision making so crucial. Prison administrators often must act swiftly, in a highly charged atmosphere, and possibly on the basis of limited information. *Cf. Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, ___U.S. ___, 105 S.Ct. 2768, 2774 (1985) (evidentiary standard in disciplinary proceeding is less because of exigencies in prison security matters). The officials' familiarity with their own institutions is uniquely important. As this case demonstrates, prison officials must consider the physical structure in which the riot occurs; the personalities of the inmates; the effects that a riot in one cellblock of the prison may have on other areas of the prison and the danger that violence will spread; the risk to the hostage; the various possible responses; and the dangers to prison staff who must take action to stop the riot, as well as to the inmates caught up in the riot.[13] Development of a riot-control plan calls for

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[13] As this Court has said, in a different context:

> In assessing the seriousness of a threat to institutional security prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long-standing relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The

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specialized training in and knowledge of the correct use and comparative risks and benefits of various riot control techniques. (*See, e.g* , the testimony of defendant Whitley detailing his extensive training in this area (Tr. 367-68)). The variables are so many that there probably is no one best response; necessarily, any response will involve calculated risks. The extent to which prison administrators can fully assess all of the possibilities and all of the variables will depend on the exigencies at hand. Thus, the general observation that prison administrators have "a better grasp of [their] domain than the reviewing judge," *Bell v. Wolfish*, 441 U.S. at 548, is even more compelling in a riot where the life of a hostage is at stake.

C. Application of the Proper Eighth Amendment Standard in Prison Riot Situations Requires Reversal of the Ninth Circuit Decision in This Case.

Due consideration of this Court's Eighth Amendment jurisprudence and proper regard for the policies informing the decisions relating to prison administration reveal the appropriate constitutional standard for review of forceful actions taken by prison officials in suppressing a prison riot. The Eighth Amendment standard for cruel and unusual punishments proscribes the infliction of pain "unnecessarily and wantonly" or with "deliberate indifference." A constitutional violation is not established by simple reference to less harsh alternatives. Rather, the challenged action must be so without penological justification that a court can infer pain was inflicted intentionally for the purpose of inflicting pain, or with deliberate indifference to the suffering that it would cause. Official measures to quell a prison riot, including the

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> judgment of prison officials in this context . . . turns largly on "purely subjective evaluations and on predictions of future behavior" . . . .

Hewitt v. Helms, 459 U.S. 460, 474 (1983).

use of physical force on a prisoner, violate the Eighth Amendment only when the actions make no measurable contribution to the accepted correctional goal of insuring security and order in prisons and jails. *See Coker v. Georgia*, 433 U.S. at 592.

Where prison administrators are, as here, presented with a prison riot in which the lives of prisoners and guards alike are threatened, the cruel and unusual punishments clause rarely will be implicated. In extreme or unusual instances, however, it might be. For example, if injurious force is used after prisoners have relinquished their weapons and attempted to surrender to prison authorities, such force would be without penological purpose in that it would not at that point measurably contribute to the goal of ensuring prison security and order. Similarly, force that by its very nature sweeps far beyond the legitimate penological purpose, such as an order to shoot and kill any and all prisoners out of their cells, would suggest that deadly force was used not for the proper objective of regaining control, but instead to retaliate against and vindictively punish everyone participating in any fashion in the disturbance. The same would be true of an unusual and overbroad means of force, such as napalm. Such hypotheticals suggest the wanton infliction of unnecessary pain which the Eighth Amendment addresses; borderline disputes between experts over the most desirable or least drastic methods of controlling a prison disturbance do not.

Yet that is all that is present in this case. Plaintiff made no claim that the actions taken by prison officials were motivated by anything other than the hope of saving the life of the hostage and the need to regain control of the cellblock; nothing in the facts would support such a claim. Nor was there ever a suggestion that the selective use of potentially deadly force for such purposes is a means which society simply

will not tolerate — that is, that such force more or less is universally condemned.[14] Plaintiff's theory of liability was that less forceful means could have been used to stop the riot and the action taken was premature; from that, plaintiff believed that he had done enough to show that his injuries were "unnecessarily and wantonly" inflicted and that prison officials were "deliberately indifferent."

This case thus reduced to a controversy over whether prison administrators, confronted with a serious prison riot and the imminent risk of loss of life, made an incorrect assessment of how best to defuse that threat and regain control of the cellblock. Whether to use selective shotgun fire or sharpshooters, whether to use verbal warnings or shotgun warnings, whether to negotiate further and risk spread of the riot, whether to use tear gas and risk death of the hostage were classic examples of matters for the informed discretion of the officials who had to take action.[15] Wholly lacking in this case is any suggestion that the judgments they made were outside the realm of professionally accepted responses.[16] Wholly lacking in this case is any suggestion, by direct testimony or

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[14] Nor could such a claim reasonably be made. We think it is probably a matter susceptible of judicial notice that society is not offended generally by the notion that deadly force might be used to prevent the death of an innocent hostage, as evidenced world wide by governmental reaction to and methods of dealing with crisis situations such as airline hijackings and political kidnappings. That is all the more true in the context of a prison where control of a cellblock is at stake, given the recognition that society insists on security as the paramount objective within prison walls. *See Hudson v. Palmer*, 104 S.Ct. at 3201. Moreover, in this case, even plaintiff's own experts acknowledged that force, even deadly force, might be appropriate. The disagreement was in part on the timing of its use. (*See, e.g.*, Tr. 266, 314).

[15] *Cf. Estelle v. Gamble*, 429 U.S. at 107 (whether an X-ray or additional diagnostic technique or form of treatment is indicated is a classic matter for medical judgment; misjudgment at most is malpractice and not cruel and unusual punishment).

[16] *Cf. Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) (in determining

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inference, that injuries were inflicted in retribution or retaliation for the inmates' riotous and violent conduct. Because of those evidentiary shortfalls, there is no basis upon which the defendant prison officials should have been subjected to liability for money damages for the actions they took to restore control of the cellblock and to save the hostage's life.

The Ninth Circuit's resolution of this case forces prison officials to walk a constitutionally unacceptable fine line. In a riot, prison officials unquestionably have a duty to act to protect the life of hostages and to protect the personal safety of prison staff and the inmates themselves. *See Hudson v. Palmer*, 104 S.Ct. at 3200. Because of the conflicting security interests presented, institution officials are as easily subject to suit for the force they fail to use and the control they fail to exercise, as for the actions and force they do use.[17] We recognize that the Eighth Amendment demands that the need to take action not serve as a pretext or license for malicious or sadistic infliction of pain. The standard we advocate ensures against such abuse of governmental authority. But short of that evil, prison officials must be given appropriate latitude. They cannot and should not be deterred in their pursuit of their lawful objective by the shadow of lawsuits or by the knowledge that courts and juries, with no particular expertise,

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rights of the involuntarily committed to reasonable conditions of safety and freedom, the Constitution requires only that courts make sure professional judgment was in fact exercised; it is not apppropriate for courts to specify which of several professionally acceptable choices should have been made).

[17] This case underscores that fact. In a class action suit brought by the inmates, eventually without success, this isolated riot and the danger to the personal safety of non-rioting inmates was one circumstance the class pointed to in attempting to make out an Eighth Amendment claim based on the general conditions of their confinement. *See Capps v. Atiyeh*, 495 F.Supp. 802, 812 n. 16 (D. Or. 1980) and *Capps v. Atiyeh*, 559 F.Supp. 894, 903 (D. Or. 1982) (on remand).

will be free to second-guess their actions from the hindsight perspective of a distant courtroom rather than with deference to administrative expertise and the exigencies with which officials were confronted.

As already demonstrated, the decisions of this Court do not support the assertion that the Constitution requires prison officials confronted with a riot to choose the least forceful, as opposed to the most effective, means of quelling the riot and saving the lives of those at risk. It requires only that they not inflict "cruel and unusual punishment" in responding to the riot. The Ninth Circuit's decision erroneously gives an inmate the right to be subjected only to the least intrusive official measures conceivable to stop a prison riot. Moreover, the Ninth Circuit's resolution of plaintiff's challenge through application of a tort-like inquiry incorrectly leaves the boundaries of the Eighth Amendment to be set by the "expert" of a jury's choice. Thus, when the lower appellate court left it to the jury to weigh the expert testimony and pick and choose the opinion it prefers, it necessarily transformed the Eighth Amendment into the arbiter of competing penological opinions and philosophies, rather than a principle of law intended to protect against unacceptably harsh and brutal punishments. The Ninth Circuit thus erred, and its decision should be reversed.

III. The Ninth Circuit Misanalyzed Defendant Prison Officials' Claim of Qualified Immunity and Thus Erroneously Exposed Defendants to § 1983 Liability for Actions Taken to Quell a Prison Riot.

Unlike the Ninth Circuit Court of Appeals, the district court paid close heed to decisions of this Court when it granted the prison officials' motion for directed verdict on the alternate ground that the officers were immune from damages

liability. The district judge appropriately based this ruling upon his determination that "[h]ere, there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage." *Albers v. Whitley*, 546 F.Supp. at 737. A majority of the court of appeals, however, declined to engage in this type of analysis. Astoundingly, the majority viewed the question of a prison official's § 1983 liability as an all-or-nothing proposition when it equated entitlement to qualified immunity with liability on the merits of an inmate's Eighth Amendment claim:

> [A] new trial must determine whether Albers was subjected to cruel and unusual punishment under the "deliberate indifference" standard by defendants' use of excessive force against him. If it is determined that the prison authorities' conduct did not violate this standard, they are absolved of all liability under § 1983. If an eighth amendment violation is found, there is no qualified immunity defense available.

Albers v. Whitley, 743 F.2d at 1376.

The majority's surprising conclusion purportedly followed from its reasoning that findings on the merits issue and on the immunity question were mutually exclusive, reasoning that is hopelessly circuitous:

> [T]here is overlap between our eighth amendment analysis and the qualified immunity defense. A finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive. "Those 'deliberately indifferent' to the [plaintiff's right] . . . could not show that they had not violated 'established statutory or constitutional rights of which a reasonable person would have known.'" *Haygood v. Younger*, 718 F.2d at 1483-84. *See Miller v. Solem*, 728 F.2d at 1025. Similarly, deliberate indifference to Albers' right to be free of cruel and unusual punishment would

> violate a right "clearl established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. ___, ___, 104 S. Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).

Ibid.

The panel majority's equation of the qualified immunity issue with the issue of liability on the merits is patently incorrect. The majority not only bypassed the pertinent test of qualified immunity, it effectively attributed to the defendants the perspicacity to foresee, at the time they took action, that four years later the court would recognize a prisoner's constitutional right to be subjected only to the least intrusive official measures that might be taken to quell a prison riot.

The Ninth Circuit's resolution of the defendants' qualified immunity claim contravenes qualified immunity principles set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and restated most recently in *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806 (1985). In *Harlow*, the Court recognized that an executive official's qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Forsyth*, 105 S.Ct. at 2816. From this characterization flows a principle directly at odds with the Ninth Circuit's unjustified merger of the analyses of a qualified immunity claim and the merits of the claimed violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment:

> [I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.

Ibid.

The Ninth Circuit panel majority did not perceive this analytical distinction even though the dissenting judge pointedly faulted the majority's merger of the immunity inquiry and a review of the merits:

> This incorrectly inserts a subjective element into the determination of an official's immunity. It also transforms qualified immunity from a question of law for the judge, to a question of fact for the jury."

743 F.2d at 1377 (Wright, J., dissenting).[18] As a result, the majority did not focus initially, as it should have, on the immunity question whether a right clearly had been established, before it examined the issue on the merits whether defendants had been deliberately indifferent to that right.

If the majority had stopped to pose the immunity question, it might have realized that the Eighth Amendment right it implicitly deemed to be clearly established was a prison inmate's right to be subjected only to the least drastic amount of force that might be used to suppress a prison insurrection. The court, however, glossed over the immunity issue. Consequently, the court failed to observe another lesson of *Harlow*: "[T]hat officials performing discretionary functions are not subject to suit when . . . questions [of the constitutional validity of their actions] are resolved against them only after they have acted." *Forsyth*, 105 S.Ct. at 2820; *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

Under *Harlow* and *Davis v. Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984), defendant executive officials are entitled to immunity "so long as [their] actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Forsyth*, 105 S.Ct. at 2814, *quoting Harlow*, 457 U.S. at 818; *see also Forsyth*, 105

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[18] This Court noted last Term "that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Forsyth*, 105 S.Ct. at 2817 n. 10.

S.Ct. at 2818. The weighty public policy underlying this principle is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Forsyth*, 105 S.Ct. at 2815, *quoting from Harlow*, 457 U.S. at 819 and *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Due regard for that policy is particularly critical when prison administrators and personnel are confronted with a prison riot and the lives of hostages and inmates are at stake. It was therefore crucial in this case that the lower appellate court determine whether the law clearly proscribed the actions taken by the defendants.

The district court, in granting defendants' motion for directed verdict, and the circuit court minority, in arguing for affirmance, addressed this legal question and correctly concluded that defendants were entitled to qualified immunity given the dearth of constitutional law authority proscribing the use of deadly physical force to quell a prison riot. *Albers v. Whitley*, 546 F.Supp. at 737, and 743 F.2d at 1378 (Wright, J., dissenting).[19] The dissenting court of appeals judge recognized the error of the majority opinion. He pointed out that the majority decision was "the first case in which a federal court has countenanced a cause of action for cruel and unusual punishment arising from a prison disturbance." *Id.* at 1377 (Wright, J., dissenting). In specifically addressing the issue of defendants' entitlement to claim qualified immunity, the dissent said:

> No court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled. These rights are not "clearly established" under *Davis*.

[19] Under state law, prison officials are immune from liability for "[a]ny claim arising out of riot, civil commotion, or mob action or out of any act or omission in connection with the prevention of any of the foregoing." Or. Rev. Stat. § 30.265(3)(e).

Id. at 1378. Bound up in its overlapping analysis of the merits and immunity, the majority failed to appreciate the significance of this point.

Nor did the circuit court decisions upon which the Ninth Circuit majority relied in simultaneously disposing of the immunity and the merits issues clearly establish standards to guide the official actions taken by Oregon State Penitentiary officials to stem a prison riot and rescue a hostage guard on June 27, 1980. *See Albers v. Whitley*, 743 F.2d at 1374-76. *Ridley v. Leavitt*, 631 F.2d 358 (4th Cir. 1980), *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980), *Williams v. Mussomelli*, 722 F.2d 1130 (3th Cir. 1983), and *Jones v. Mabry*, 723 F.2d 590 (8th Cir. 1983) did not deal with prison riot situations. *Ridley*, *King*, and *Williams* involved alleged isolated beatings of prisoners. *Jones* was concerned with stringent administrative measures employed *after*, rather than during, a series of prison disturbances and escape attempts. Each decision was published *after* defendant prison officials acted in this case. But even insofar as decisions such as *King*, 636 F.2d at 73, looked to the case of *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), as having established a constitutional standard for review of allegations of isolated beatings of inmates, they did so with regard to situations that are clearly distinguishable from the circumstances that defendants here faced.[20]

[20] Moreover, we question whether the least restrictive means standard adopted by the Ninth Circuit under the Eighth Amendment comports with the standard recognized in *Johnson v. Glick* as emanating from the Due Process Clause to protect a pre-trial detainee from isolated beatings:

> In determining whether the constitutional line has been

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The Ninth Circuit's implicit resolution of the qualified immunity on the bases of *Miller v. Solem*, 728 F.2d 1020 (8th Cir. 1984) and its own prior opinion in *Haygood v. Younger*, 718 F.2d 1472 (9th Cir. 1983) *petition for rehearing en banc granted*, 729 F.2d 613 (9th Cir. 1984), evokes similar criticisms. The lower court majority viewed these cases as authority for adopting the extreme indifference standard of *Estelle v. Gamble*, a prison medical services case. as a restraint on official actions to put down an ongoing prison disturbance that involved the taking of a hostage and reports of the killing of an inmate. Neither *Miller*, which involved an inmate-on-inmate assault, nor *Haygood* which involved an inmate's claim of confinement beyond his release date, dealt with a situation comparable to that faced by defendant prison officials. Each decision was announced years after the Oregon penitentiary riot occurred.

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> crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and *whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.*

481 F.2d at 1033. Under the Ninth Circuit's formulation, the constitutional line could be crossed even where force sensitively and selectively was applied to restore order.

The decisions of the circuit courts that have employed a *Johnson v. Glick* type of test for identifying violations of the Cruel and Unusual Punishments Clause have involved isolated instances of violence directed at inmates by lower level officials, not riot/hostage situations. *E.g.*, *Norris v. District of Columbia*, 737 F.2d 1148 (D.C. Cir 1984) (inmate alleged single, unprovoked assault with mace, kicking and punching by four guards); *Smith v. Iron County*, 692 F.2d 685 (10th Cir. 1982) (pretrial detainee maced for refusal to stop pounding hole in wall with heavy metal drain cover); *Martinez v. Rosado*, 614 F.2d 829 (2d Cir. 1980) (single attack on inmate by guard); *Arroyo v. Schaefer*, 548 F.2d 47 (2d Cir. 1977) (pretrial detainees hit with gas intended for detainee who refused to return to his cell); *cf. Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir. 1975) (ill advised and unnecessary use of tear gas in the face of a minor disturbance was a reflex action and did not evidence punitive intent).

Moreover, in affirming summary judgment for prison officials who allegedly failed to prevent the stabbing of a prisoner by another inmate, the Eighth Circuit in *Miller* recognized as "clearly established" a prisoner's Eighth Amendment right "to be reasonably protected from known dangers of attacks by fellow inmates." *Miller*, 728 F.2d at 1024. Due regard for this right fairly can be said to have prompted the official action challenged in the present case, where the ringleader of the prison riot claimed to have killed one inmate and threatened to kill others.

At bottom, the only federal circuit case law establishing a prisoner's Eighth Amendment right to be free from the use of deadly physical force during a prison riot is the decision entered by the Ninth Circuit in this very case against these very defendants.[21] Despite the admonitions of this Court in *Navarette*, *Harlow* and *Davis*, the panel majority engaged in "hindsight-based reasoning" on the immunity issue. *See Forsyth*, 105 S.Ct. at 2820.

In sum, at the time Oregon correctional officers made the judgment to employ deadly force to quell a prison riot, to rescue a hostage guard, and to prevent inmate assaults on other prisoners, no clearly established law proscribed their action. This conclusion is buttressed by the fact that this Court evidently deemed the Eighth Amendment question presented in this case to be "sufficiently doubtful to warrant the exercise of its discretionary jurisdiction." *See, ibid.* Under *Navarette*, *Harlow*, *Davis* and *Forsyth*, the state corrections officials sued in this case for damages by the

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[21] *Cf. Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971) (holding that prisoners were entitled to preliminary injunctive relief under § 1983 and the Eighth Amendment from abuse and mistreatment by prison guards acting in reprisal *after* state officials had suppressed a prison revolt and had regained control of the correctional facility from rioting prisoners.)

prisoner plaintiff are immune from liability.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed. The case should be remanded with instructions to reinstate the judgment for petitioners that was issued by the district court.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
Counsel for Petitioners

APPENDIX A

SELECTED WITNESS TESTIMONY SUMMARIES

1. *The decision to use potentially deadly force.*

a) *Plaintiff's evidence.*

As part of his case in chief the plaintiff introduced the deposition testimony of four prison officials, Clayton Jacobs, petitioner Harol Whitley, David I. Jackson, and Merritt Barth, and testimony from petitioner J.C. Keeney. Their statements regarding the official decision to use potentially deadly force to put down the prison riot involved in the case is summarized below.

Clayton Jacobs, a captain at Oregon State Penitentiary (OSP) (Tr. 208), testified that he was responsible for the institution the night the riot broke out. (Tr. 210). He called defendant Whitley, discussed the situation with him, and then went to the arsenal where he obtained "gas and equipment." (Tr. 210). Jacobs and Whitley spoke to inmate Klenk, the leader of the disturbance, on at least two occasions in the corridor leading to A Block. (Tr. 211-12). During one of these contacts Whitley talked to the guard taken hostage, Sergeant Fitts. Fitts informed Whitley that he was "fine." (Tr. 214). Jacobs observed that the barrier, constructed by inmates to limit cellblock access, was larger than when he first observed it. (Tr. 215). An initial decision was made to use gas (Tr. 213), but that decision was never made "concrete." (Tr. 216). Once the decision to use shotguns was made, instructions were given to shoot low because "[t]hey weren't interested in killing anyone." (Tr. 218). Whitley said to fire a warning shot as guards went in over the barricade to make the inmates get their heads down. (Tr. 218). Jacobs did not recall "any real comments regarding the use of the warning shot to get the inmates back into their cells" (Tr. 218), although the prison officials "pretty well knew" that

many inmates would go to their cells and that was what prison officials wanted. (Tr. 218-19). When asked why gas guns were carried in addition to shotguns, Jacobs described one possible event that could have prompted the use of gas:

> Answer: . . . Well, one thing is we didn't go into A Block with the intention of killing any of those people. The shotguns, in my mind, were used to control the situation so we could get in and get to Sergeant Fitts before anything happened to him. Then if it was necessary to use gas, I imagine we would have used it rather than shooting people with shotguns.
>
> Question: So if in fact Sergeant Fitts was placed into a safe position but inmates continued to act out in some way, then the gas might appropriately have been used?
>
> Answer: Possibly.

(Tr. 221).

Harol Whitley, Director of Institution Security at OSP (Tr. 267)[1] and a defendant in this case, testified that the purpose of the warning shot was to "desburse [*sic*] the inmates." (Tr. 236). He believed that most of them would fall face down on the floor when the first shot was fired. (Tr. 236). For that reason he had the second and third shotguns behind the first to respond to inmates who might get up and attack people from behind. (Tr. 236). Although aware that some inmates might react by heading up the stairs to their cells (Tr. 236), Whitley instructed the officers armed with shotguns to shoot anyone who started up the stairs in the direction of the cell where the hostage was being held. (Tr. 239). Whitley thought that the person who shot Albers believed that Albers was either "after me because I had ran past him, or was heading toward that cell to help Klenk with Sergeant Fitts." (Tr. 238-39).

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[1] Whitley was incorrectly identified in the complaint as Assistant Superintendent at OSP.

David I. Jackson, a lieutenant at OSP (Tr. 242), testified that he entered A Block armed with a 12-gauge shotgun (Tr. 247) loaded with number six shot. (Tr. 248). His instructions were to shoot at the knees or lower of anyone headed toward cell 201, where the hostage was being held. (Tr. 248).

J.C. Keeney, Assistant Superintendent at OSP (Tr. 465) and a defendant in this case, testified that the assault squad was organized in a line formation before they went over the barricade. (Tr. 322-24). Keeney stated that the first priority in the decision to go into the cellblock was the safety of Sergeant Fitts, the hostage. (Tr. 246). He described the decision as "tough . . . we haggled over it for a long time and did a lot of soul searching over it." (Tr. 246).

Merritt Barth, a lieutenant at OSP (Tr. 348), testified that Whitley and Keeney had discussed the use of gas and rejected it "for a couple of given reasons," (Tr. 350), including the fact that the only exit out the back was blocked,[2] and that gas would be ineffective because the solid nature of the cell doors would allow an inmate to close the door, put a blanket underneath, and thereby prevent the gas from entering. (Tr. 350). Barth was instructed to follow the officers carrying shotguns to prevent inmates from assaulting the armed officers from behind. (Tr. 351).

b) *Defendants' evidence.*

Harol Whitley testified that inmate Klenk told him that Klenk would personally cut the hostage's throat if Whitley attempted to rush the cellblock, (Tr. 369), that inmates were going to kill the "rapos" and "niggers," and that one "rapo" had already been killed. (Tr. 372).

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[2] Plaintiff's expert, Mr. Lou Brewer, had previously testified that accepted corrections procedure when using gas included leaving an avenue for inmates to escape from the gas. (Tr. 288).

Prison officials first decided to go into the area of the disturbance with tear gas. (Tr. 372-33). While approaching the cellblock entrance, Whitley discovered that the barricade had been moved closer to the entrance and that he could not budge it when he leaned against it to see if it could be pushed out of the way. (Tr. 373). When Whitley was taken to see the hostage, Klenk held a knife against Whitley's throat and threatened again to kill the hostage in the event of an assault. (Tr. 374).

Contrary to the stipulated facts, Whitley denied that the two inmates in cell 201 had told him that they would protect the hostage. (Tr. 383). He testified that he believed it was possible that they would support Klenk and perhaps try to kill Sergeant Fitts. (Tr. 384).

Whitley informed Keeney that he believed that gas was impractical because the barricade was not movable and only one person at a time could get over it.[3] (Tr. 374). According to Whitley, gas would have been ineffective because "[y]ou could not have got enough gas into the cellblock to have had any effect on anyone . . . You could not get people over quick enough to, in my opinion, get to Klenk before he would get to the hostage." (Tr. 379). While inside, Whitley had heard one inmate "hollering" for help. It sounded like someone was beating him. (Tr. 374). Whitley explained his observations to Superintendent Cupp, and included a description of the problem presented by the barricade. (Tr. 374-75). Cupp authorized the use of shotguns to get the hostage out. (Tr. 375).

Whitley instructed the assault team that he would make one more effort to talk with Klenk and to try to obtain the

[3] Plaintiff's expert, Mr. Lee Perkins, had previously testified that it would take tear gas 20 to 25 seconds to "begin to come up," (Tr. 312) and two and a half to three minutes to fill the room "and it might not totally fill the room at all." (Tr. 312).

release of Sergeant Fitts without the use of force. If that was unsuccessful he would "holler," "come on Kennicott" (Tr. 375). Kennicott was instructed to fire a warning shot into the wall and then, if anyone headed for the cell where Fitts was held, to shoot them. (Tr. 375, 397).

Robert L. Kennicott, a captain at OSP (Tr. 457) and a defendant in this case, testified that he was called from home the night of the riot. When he arrived at cellblock A he observed a riot squad in formation with shotguns, gas guns and riot batons. (Tr. 458). He was instructed to fire one shot to disperse the inmates, to shoot low if shooting someone, and to shoot anyone heading toward cell 201. (Tr. 458).

J.C. Keeney testified that the moving and strengthening of the barricade markedly changed the situation, and that the combined factors of the blocking of the only escape route and the movement of the hostage to an upper tier cell rendered gas too dangerous to the hostage. (Tr. 467, 499-500).

Hoyt C. Cupp, Superintendent of OSP (Tr. 506) and a defendant in this case, testified that upon his arrival at OSP he was briefed by Keeney, Whitley and other institutional personnel. He was given information including: The taking of Sergeant Fitts as a hostage and the resultant danger to Fitts' life; the inmates' failure to obey the cell-in order; the destruction of furniture; the physical attack on at least one inmate; the fact that several inmates were armed with clubs and that one had a knife that he was threatening to use; the accelerating destruction and violence, including a disturbance starting in an adjacent cellblock; the abandonment of the plan to use chemical agents because of the barricade and the closed emergency exit; and the failure of attempts at discussion with the inmates. (Tr. 510-11, 515).

Agreeing that tear gas would be ineffective, Cupp, with the assistance of Keeney and Whitley, formulated a new

plan. Cupp ordered the use of shotguns "as the proper and expedient means to prevent almost certain loss of life of the hostage, as well as inmates." (Tr. 511). An additional factor favoring the use of shotguns was the fact that cells in A Block have walls rather than bars, that would protect any inmate who had obeyed the cell-in order from shotgun pellets. (Tr. 512).

2. *The experts.*

a) *Plaintiff's experts.*

1) *Lou Brewer*

Mr. Brewer, a former superintendent of prisons in Iowa and Illinois (Tr. 257-58), testified to a number of actions, short of the use of firearms, which he believed could or should have been employed to control the inmate disturbance. The first was communication with the ringleader to determine his motivations, and to attempt to reason with him. (Tr. 262). He testified that he had "reservations" whether this option was fully explored (Tr. 263), although he appeared to agree that the attempt might have been unsuccessful in light of plaintiff inmate Albers' testimony that Klenk was high. (Tr. 279).

Mr. Brewer testified that other options such as gas, shields and riot batons, and subduing the leader should have been considered. When asked if there was any "correctional reasoning" that he could discover for the decision to abandon the original plan involving tear gas, Mr. Brewer testified that he did not "really relate to why that course of action was abandoned." (Tr. 264-65). Mr. Brewer also did not "relate" to the impact that moving the barricade would have had on the decision not to use gas. (*Id.*) Mr. Brewer conceded that he did not know how long it would take for gas to be effective in A Block (Tr. 283-84), and he was unclear about the importance and availability of an escape route. (Tr. 285-88).

Mr. Brewer was unable to find any support in the material he reviewed for the proposition that the riot was spreading. (Tr. 261). He suggested that Whitley could have attempted to disable Klenk during the course of one of their conversations (Tr. 267-68), although he apparently admitted that the attempt to do so single-handedly, in the presence of ten to fifteen other prisoners, would not be sound correctional practice. (Tr. 281-82).

Mr. Brewer testified that some form of warning that action was imminent, coupled with an opportunity for non-participants to exit would have been appropriate. (Tr. 268-70). Mr. Brewer acknowledged that Albers had plenty of notice "that at some point [the use of firepower was] likely to occur." (Tr. 292).

Additionally, Mr. Brewer suggested that the use of riot batons would have been appropriate (Tr. 266), and he agreed that clubbing the inmates into submission was "a possibility." (Tr. 289-90). He also acknowledged that riot batons could have caused death or permanent disability. (Tr. 289). Mr. Brewer offered the opinion that the actions taken by Oregon prison officials constituted the use of deadly force and that the use of deadly force was excessive and not necessary. (Tr. 266).

2) *Lee H. Perkins*

Mr. Perkins, a former commander of the Multnomah County (Oregon) Courthouse jail (Tr. 299), suggested, as an alternative to the measures taken by defendants, the use of various riot formations and an entry through a door into the second tier. (Tr. 311). When informed that the door to which he referred was plugged, Mr. Perkins indicated that that fact would change his plan. (Tr. 316-17).

Mr. Perkins suggested that a rifleman could have been posted to "immobilize" anyone going to cell 201 "with one

shot." (Tr. 311). The fact that it would have been necessary to shoot past as many as fifty inmates to do so did not change his view. (Tr. 316).

Mr. Perkins suggested that the assault team could have stormed the barricade and sealed off the stairwell. (Tr. 313). In his opinion, the defendants were "possibly a little hasty in using the firepower on them." (Tr. 314).

b) *Defendants' experts.*

1) *W. James Estelle, Jr.*

Mr. Estelle, the Director of the Texas Department of Corrections (Tr. 433), testified that the verbal warnings of the "stop or I'll shoot" variety would be appropriate if the circumstances permitted. (Tr. 446). Given the circumstances of this case, however, verbal warnings would have further endangered the hostage by alerting the principal inmate rioter and his supporters. (Tr. 438, 450).

Mr. Estelle testified that gas would have been ineffective to confuse, disable and disengage the hostile inmates. In his view, there was no way to get the massive amount of gas needed into the cellblock before the rioters could have reached the cell where the hostage was held. (Tr. 439).

Mr. Estelle offered the opinion that the use of shotguns, under instructions to shoot any inmate heading for cell 201 where the hostage was held, was both reasonable and necessary under the circumstances. Mr. Estelle agreed that the performance of prison officials was consistent with modern accepted prison riot control procedures; and he stated that he would have difficulty giving an example of "more courageous and appropriate action by a group of corrections personnel under that kind of trying circumstances." (Tr. 437).

2) *Roger W. Crist*

Mr. Crist, the Secretary of the New Mexico Corrections Department (Tr. 540), testified that the option of attempting

to talk to the rioters had been exhausted as a reasonable alternative. (Tr. 547, 558-59). According to Mr. Crist, an attempt by Whitley individually to disable Klenk would have had the probable effect of causing other inmates to jump in on Klenk's side. (Tr. 550-51). Mr. Crist saw no need for a separate, on-site commander who, unlike Whitley, would not have participated in the actual assault. (Tr. 565).

The narrow space for cellblock entry and the barricade combined, in Mr. Crist's opinion, to make it impossible to get sufficient manpower in quickly enough to make riot batons practical. (Tr. 551). Mr. Crist described the factors in this situation which distinguished it from a former situation in which he had employed a sniper to save a hostage, but in which the hostage-taker had been killed. (Tr. 543-48).

Mr. Crist testified that although verbal warnings of intent to shoot would be appropriate if time permitted, under the circumstances of this case the warning shot was much more effective than a verbal warning would have been. (Tr. 554, 556, 563). Mr. Crist agreed with the defendant prison officials and Mr. Estelle that verbal warnings before entering the cellblock with force would have tipped the defendants' hand about their intention. Based upon Klenk's threat to kill the hostage, he stated that the element of surprise was extremely important. (Tr. 548-49). In his opinion, Whitley's action in coming over the barricade without weapons surprised everyone in the block and took command of the situation. (Tr. 549-59).

Mr. Crist agreed that the use of firearms was reasonable and that less forceful alternatives were not reasonably available. (Tr. 552). He endorsed the order to shoot inmates headed toward cell 201 where the hostage was held. (Tr. 552). In his opinion, the instructions to shoot toward those headed to cell 201 was reasonable, "particularly in view of the fact that the orders were to shoot low so the intent was not to

kill anyone, but to provide the least amount of damage and still control the situation." (Tr. 552). Mr. Crist described the defendants' response was as "almost a textbook model" of modern accepted prison riot control procedures. (Tr. 553-54).

(6)

No. 84-1077

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, *et al.*,

Petitioners,

v.

GERALD ALBERS,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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*GENE B MECHANIC
(Appointed by this Court)
STEVEN GOLDBERG
ALICE GOLDSTEIN
808 S.W. Alder, Suite 200
Portland, Oregon 97205
Phone: (503) 224-2372
Counsel for Respondent

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTION PRESENTED

Whether a jury question is created under 42 U.S.C. Section 1983 when substantial evidence shows that the intentional shooting of a prisoner by prison personnel was unnecessary under the circumstances as reasonably perceived by the defendants.

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STATEMENT OF THE CASE

Introduction

This case arises out of the shotgun shooting of Gerald Albers by corrections officers at Oregon State Penitentiary on the evening of June 27, 1980 during the course of a cellblock disturbance. Albers was a prisoner totally innocent of promoting the disturbance. A shotgun blast struck him in the rear left leg, causing considerable permanent disability. Albers has sued various prison officials under 42 USC Section 1983 seeking compensation for his injuries. Defendant Cupp was prison superintendent; defendant Keeney was assistant superintendent; defendant Whitley was security manager and defendant Kennicott was a captain (J.A. 13, 14).[1]

This case was tried to a jury pursuant to plaintiff's exercise of his seventh amendment right to a jury trial. However, the district court removed the case from the jury's consideration by directing a verdict for defendants. *Albers* v. *Whitley*, 546 F.Supp. 726 (D. Or. 1982). The Ninth Circuit reversed the district court's judgment, and remanded for a new trial. The Ninth Circuit held that the trial judge, in issuing a directed verdict against defendant, resolved contradictions in evidence relating to whether the force used was excessive, and passed upon the credibility of witnesses, both of which are properly jury functions. *Albers* v. *Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984).

A directed verdict is appropriate only if, after viewing the evidence as a whole and drawing all possible

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[1] Citations to the Joint Appendix in this Court are designated as J.A. ____. Citations to the record below are the record certified in the "Excerpt of Record" for the Ninth Circuit and are designated as R. ____.

inferences in favor of the party against whom the verdict is sought, the court finds no substantial evidence that could support a jury verdict in that party's favor. *E.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 n.6 (1962); *Albers* v. *Whitley*, 743 F.2d at 1375. Therefore, in reviewing the court of appeals' decision below, this Court must view the evidence as a whole and draw all inferences in favor of Albers.

Statement of Facts

Albers was housed in cellblock A, an honor cellblock housing over 200 prisoners with good disciplinary records (J.A. 14). The cellblock consists of two tiers with 56 cells on the upper tier and 55 cells on the lower tier. Lower tier cells are adjacent to an open area from which there is both a stairway leading to the upper tier and a hallway leading out of the cellblock. The lower tier cells are separated from the open area by floor to ceiling bars and a bar door which allows for access from the lower tier cells to the open area (J.A. 14).

On Friday night, June 27, 1980, some prisoners in cellblock A became distressed when they believed that other prisoners being taken to the segregation and isolation ("S and I") building were being mistreated. Two corrections officers, Walker S. Fitts and John Kemper, were on duty in cellblock A at the time. At 9:15 p.m., a bell rang and word was passed down the cellblock that prisoners were to return to their cells ("cell-in") (Tr. 139). At the time, Albers was already at his upper tier cell, number 274 (J.A. 14, 15; Tr. 139).

During the next hour, the following events occured. Immediately after the bell rang, several prisoners questioned Kemper as to the reason for the cell-in order. One prisoner, Richard Klenk, became particularly upset.

Kemper left the cellblock, but Officer Fitts, who was standing nearby, remained. After Kemper left the cellblock, the steel bar door between the lower tier cells and the open area in front of the cellblock was locked (J.A. 15).

Shortly after Kemper left the cellblock, Klenk and a few other prisoners—at most ten to twenty—began to break furniture (Tr. 105, 159). The furniture breaking lasted for about 15 to 30 minutes (Tr. 106, 139, 159). Two prisoners then told Officer Fitts he could go into an office off the open area, saying he would be protected there. After Fitts entered the office, the door to it was closed (Tr. 105, 106, 159; J.A. 15).

Immediately upon learning of the disturbance, Whitley and Captain Jacob went to the prison arsenal and gathered shotguns and tear gas guns (Tr. 210, 369). Both Whitley and Jacob entered cellblock A, stepping over some furniture which had been placed by prisoners in the hallway leading to the cellblock (J.A. 15). Whitley then talked with Klenk, but spoke with no other prisoners (TR. 211). Four prisoners were next allowed to go to the S and I building to see the condition of the prisoners whose apparent mistreatment had triggered the disturbance. Whitley left the cellblock with the four prisoners, who returned to cellblock A after visiting the S and I building (J.A. 15 and 16).

On their way to the S and I Building, the four prisoners observed corrections officers gathering together shotguns and donning vests; after their return to cellblock A, at least one of the four informed other prisoners of the shotguns (Tr. 166-167). Specifically, Klenk was aware that corrections officers had shotguns (Tr. 173). Albers, however, did not know of the shotguns; rather, he believed that any action taken was going to be via tear gas (Tr. 141-142).

Several minutes later, Whitley returned to cellblock A, and at his request, Klenk brought Officer Fitts with him to see Whitley. Whitley again determined that Fitts was unharmed, and again left the cellblock (J.A. 16). Fitts returned to the office, and 15 minutes later he was escorted to cell 201 on the upper tier (J.A. 16). The two prisoners who were housed in cell 201, Kurt Riemer and Michael Kliment, remained in Fitts' vicinity (J.A. 16).

Whitley entered the cellblock for a third time, and, at his request, Klenk took him up to cell 201 where he again saw Officer Fitts and determined he was unharmed (J.A. 16). At that time, the inmates in cell 201 advised Whitley they would prevent harm to Fitts (J.A. 16, 17).

Albers had remained at his cell from 9:15 until 10:15, when another prisoner asked him to go downstairs to help calm down Klenk who was by then the only prisoner acting disruptively (Tr. 110, 141, 185, 187, 425). At approximately 10:15 p.m. Albers went down the stairs from the upper tier to the open area in front of the lower tier cells. At that time, the steel bar door which provides access from the lower tier to the open area was closed and locked. Several elderly prisoners who resided in the forward cells in the lower tier, commonly known as "medical cells," wanted to leave the cellblock in case tear gas was to be used (Tr. 193). Albers asked Whitley for the key to unlock the sliding bar gate in order to let the old men leave the medical cells (Tr. 116, 224). Whitley responded that he could not find the key, and left, saying he would return with it (Tr. 116-118, 193, 224, 580).[2]

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[2] In its Statement of the Case, the defendants claim that it was at this point that Whitley discovered the "barricade" had been constructed (State's Brief at 4, paragraph 1). In fact, the evidence is clear that Whitley crossed over this "barricade" the first time he entered the cellblock. (*See, e.g.*, J.A. 15; Tr. 213-215, 369).

By this time, the assault group had assembled outside the entry way with Officers Kennicott, Jackson and Smith wielding shotguns (Tr. 375). Cupp, Keeney and Whitley decided to storm the cellblock with firearms (Tr. 374-75, 467, 511). Meanwhile, Albers was waiting at the bottom of the stairway for Whitley to return with the key. Whitley returned, reentered the cell block, and Albers asked about the key. Whitley responded that he did not have it, suddenly screamed "shoot the bastards," and began running up the stairs after Klenk (Tr. 118; see also Tr. 225).

The assault team entered shooting, and Albers immediately headed up the stairway to get back to his second tier cell (Tr. 118). Just prior to or while crossing the "barricade," Kennicott discharged the first shot into the wall opposite the cellblock entrance. (Compare, J.A. 14 with TR. 461).

One purpose of this first shot was to get the prisoners to head back to their cells (Tr. 218-219, 247, 353-4, 460). The only route available to Albers to return to his second tier cell was via the stairway leading up to cell 201 (Tr. 227). But as Albers headed up the stairs towards his cell, Kennicott fired second and third shots at him, one of which hit Albers in the back of his knee (J.A. 17). This occurred no more than 3-5 minutes after Albers arrived downstairs (Tr. 186).

Albers' sciatic nerve was 90% functionally eliminated by the shotgun blast, while the main artery and vein were completely obliterated (Tr. 67). Although Albers placed a tourniquet on his leg while waiting for medical attention (Tr. 119), his blood loss was so extensive that he needed a transfusion of six pints of blood, out of a total of nine to eleven pints in the whole body (Tr. 73, 87).[3]

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[3] The shotgun injury to Albers' left leg also caused considerable

As Albers was being shot, Whitley and other officers had caught and subdued Klenk at the doorway to cell 201, encountering no resistance on his part (Tr. 164, 234). No prisoners impeded Whitley from catching Klenk (Tr. 233-4, 353, 400, 424) and, in fact, the prisoners housed in cell 201 had prevented Klenk from entering the cell (Tr. 164, 489). With Klenk under control, Officer Fitts left cell 201 and exited from the cellblock, unharmed (J.A. 17, 18).[4]

By the time the assault team entered, the noise level in the cellblock was back to normal and more than a half hour had passed since the furniture breaking had ended (Tr. 106, 112, 159, 188, 193, 227-28, 531). The open area in front of the lower tier cells was normally lit and was bright enough to enable defendants to distinguish Albers from other prisoners and Klenk (Tr. 227, 422, 574, 578-9).

The only prisoner with a weapon was Klenk, who reportedly had a handmade knife in his rear pocket. A thorough shakedown of the cellblock turned up no other weapons (Tr. 499). According to Whitley, only two other prisoners out of the more than 200 residing in the cellblock had

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permanent damage to the muscle and major arteries (Tr. 66), as well as leaving eight permanent scars of various dimensions (Tr. 81). Three surgeries were performed in an effort to save the leg (Tr. 73-75), and although Albers can now walk with the aid of a brace, he suffers circulatory problems and constant severe pain. Without his brace, he has a "grotesque, debauched" gait. He lacks motion in his toes entirely, cannot move his foot inward or outward and has little control on flexion or extension (Tr. 78-83).

[4] Defendants' statement that the "hostage was still being held at knifepoint" (State's Brief at 17 n.6) is both inflammatory and totally devoid of support in the record. To the contrary, Fitts was being protected by other inmates who kept the only inmate with a knife away from him.

pieces of broken furniture which could be construed as weapons (Tr. 388). Nobody made any gestures with any other pieces of broken furniture (Tr. 109, 531). Sometime after the 9:15 p.m. cell-in order, there was one fight, lasting three to four minutes, (Tr. 107), but there were no other visible confrontations. Nor were any prisoners progressing through the cellblock intimidating or threatening other inmates (Tr. 108).

Rather, Klenk was the sole, out of control actor, with no other prisoners showing support for him (Tr. 214). Klenk was the officers' primary concern (Tr. 231), was viewed by them as the only person who presented a danger (Tr. 355) and, according to Officer Fitts, was the only person who threatened him (Tr. 491). Fitts also said that the other prisoners surrounding him seemed to have his safety in mind and tried to keep Klenk out (Tr. 489). Whitley indicated that he felt Fitts' safety would be secured with Klenk's apprehension (Tr. 386).

From the time the cell-in order was issued at about 9:15 p.m. until he was shot at about 10:30 p.m., Albers received no orders or instructions from any corrections officers related to his movement or location within the cellblock, nor an opportunity to seek safety (J.A. 17). At no time were prisoners (including Klenk) ever requested to return to their cells after the initial cell-in order at about 9:15 pm. (Tr. 187, 226, 425).

Neither Albers nor any other prisoners was ever warned that they might be shot or suffer other consequences if they did not return to their cells. Nor were prisoners advised to fall to the floor, take cover, or stop heading up the stairs once the assault squad entered (Tr. 226, 241, 407). Rather, the assault squad was instructed by Whitley simply to shoot anybody heading up the stairway to the second tier (Tr. 375, 407).

Albers was known by defendants to be a well-behaved prisoner (J.A. 18). After the fact they deemed Albers "a curious onlooker who got in the way and got hurt in the process" (Tr. 320).

Although tear gas had been considered as an option for resolving the disturbance, it was rejected by Whitley and his colleagues, ostensibly because the barricade would have impeded the motion of the guards and the gas. Yet the barricade took "a second or mere fraction of a second to get over" (Tr. 461), or by another estimate, "a couple of seconds" (Tr. 362). It was low enough that Kennicott was able to cross the barricade while carrying, aiming, and firing a loaded shotgun (Tr. 462; J.A. 14), and that a person standing outside the cell block could see Klenk while standing and looking over it (Tr. 215).

The State's expert witnesses, defendant Hoyt Cupp, Roger W. Christ, and W. James Estelle, Jr., all approved the use of firearms, the order to shoot any prisoner heading to cell 201, and the firing of shotguns up the stairway (Tr. 437, 513-14, 552-53).[5] Christ and Estelle both based their testimony upon a set of facts prepared by the State Attorney General's Office entitled "Riot at OSP Cellblock A", a tour of the cellblock, and some photographs (Tr. 426, 542). Cupp and Estelle mistakenly believed that at the

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[5] Estelle has been Director of the Texas Department of Corrections since 1972 (Tr. 433-434), and has been defendant in at least one case in which officers in institutions under his control have been found to have engaged in excessive force against prisoners. *Ruiz* v. *Estelle*, 503 F.Supp. 1265, 1299 (S.D. Tx. 1980), *aff'd. in part, rev'd. in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1438 (1983). (Tr. 493-497).

At the time of trial, Christ was secretary of the Corrections Department in New Mexico, having been involved in the corrections field since 1957 (Tr. 539-540).

time the assault team entered, the noise level and destruction were escalating, and Klenk was gaining support (compare Tr. 443-44, 516-518 with 106, 112, 159, 188, 193, 227-28, 531). Cupp and Christ further believed incorrectly that there had been repeated cell-in orders that evening which had been disobeyed (compare Tr. 518, 559 with 187, 226, 425). Cupp also was wrong in believing that cellblock lighting was severely diminished (compare Tr. 518 with 227, 422, 574, 578-79).

Although Estelle agreed it would be wise to distinguish between troublemakers and non-troublemakers before using force, and that it would be prudent to give a "stop or I'll shoot" type of warning if circumstances allowed (Tr. 446, 554, 556), he felt verbal warnings were not appropriate here because surprise to Klenk was a necessary element to a successful rush by the assault team (Tr. 438). Mr. Christ agreed (Tr. 548-9). In so concluding, both Christ and Estelle ignored the fact that Klenk already knew the assault team had shotguns (Tr. 173), thereby negating the surprise element on which they relied.

Nonetheless, Estelle agreed with the standards set forth by the American Correctional Association book that the "use of deadly force should be preceded by clear warning that the use of such force is contemplated" and further, if the situation is such that deadly force must be used, it should be employed with utmost precision and selectivity against the particular threat which justifies its use (Tr. 451).

Plaintiff's experts, on the other hand, felt the deadly force used against Albers was unnecessary to prevent harm to Officer Fitts or other inmates (Tr. 266). Among the options short of deadly force against Albers advocated by Lou Brewer were employment of a warning that action

was imminent, or a direct, disabling act to Klenk (Tr. 266, 268).[6] He also felt that non-participants should have been allowed to leave the cellblock (Tr. 268). Even if the only viable option was the use of deadly force, the corrections officers should have issued a verbal warning such as "Stop or I'll shoot" (Tr. 270).

In terms of defendants' overall approach, Brewer said that defendants did not adequately explore less drastic options than storming the cellblock with shotguns (Tr. 262-265, 271). Based on the overview of the situation gleaned from his review of many reports, depositions and other documents, as well as an on-site inspection, he said there was nothing which indicated to him any potential for a larger scale riot erupting in the absence of the action taken (Tr. 265). Plaintiff's second expert, Lee Perkins, indicated that defendants should have used less drastic approaches than firepower. (TR. 311-314).[7]

Legal Proceedings In Lower Courts

At the conclusion of the trial, the district court granted defendants' motion for a directed verdict, concluding that the evidence was insufficient to permit the jury to find a violation of Albers' eighth amendment right to be free

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[6] Brewer had been in the corrections field since 1961, serving as superintendent of Iowa State Penitentiary from 1969-1978, Stateville Correction Center in Joliet, Illinois from 1978-1979, assistant director for Special Services for Arkansas Department of Corrections from 1979-1980, and at the time of the trial serving as a corrections consultant (Tr. 257-58).

[7] Perkins was employed with the Multnomah County, Oregon Sheriff's Office in 1961, until his retirement in 1977. During that time he headed the internal security division for the Multnomah County Department of Public Safety and was a commander of county jails. (Tr. 298-99).

from cruel and unusual punishment and alternatively, finding that defendants were immune from suit. *Albers* v. *Whitley*, 546 F.Supp. at 733-37.

The Ninth Circuit reversed the district court judgment, and remanded for a new trial, holding that where force used is so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time, an eighth amendment violation is established. *Albers* v. *Whitley*, 743 F.2d at 1374-75. The court of appeals held that the district court usurped the jury's function by resolving contradictions in the evidence and by passing upon the credibility of witnesses. The court also held that defendants were not entitled to a qualified immunity defense. *Id.* at 1376.

SUMMARY OF ARGUMENT

I.

The issue in this case is whether a prisoner has the right to have a jury decide if his or her constitutional protections have been violated, when substantial evidence shows that prison personnel intentionally shot the prisoner, and that the use of this deadly force was unnecessary or excessive under the circumstances. Plaintiff contends that the balancing of values necessitated by this analysis is the precise function which juries have historically served. Indeed, one of the most important roles a jury can perform is to maintain a link between contemporary community values and the penal system.

The essence of the State's position is that this function of the jury somehow evaporates if the prisoner is shot in a "riot" situation. The Constitution simply does not permit the senseless shooting of a prisoner, even during a "riot." There is no "riot" exception to constitutional protection.

This is true whether analyzed in terms of the eighth amendment's cruel and unusual punishments clause or the fourteenth amendment's due process clause. Deliberate and serious intrusion on a prisoner's personal security must be reasonable in light of correctional needs.

The cruel and unusual punishments clause prohibits the "unnecessary and wanton infliction of pain" on a prisoner during confinement. Plaintiff was intentionally shot and that shooting resulted in severe pain and suffering. If the shooting was unnecessary and the reasonable perception of defendants was that it was unnecessary, then the permanent disability from which plaintiff suffers resulted from the unnecessary and wanton infliction of pain. This use of deadly force was a wanton act—it amounted to a reckless or careless disregard of, or indifference to, plaintiff's life and liberty.

Plaintiff submitted sufficient evidence to support a jury determination that his shooting was unnecessary as reasonably perceived by defendants. He was not a participant in any "riot" and, in fact, sought to help the administration resolve the security breach which was primarily promoted by one disruptive prisoner. When defendants stormed the cellblock with shotguns, plaintiff ran up the stairs to his second tier cell. On the way, he was shot in the back of his leg. Plaintiff had received no meaningful warnings of any kind that would have let him know how to avoid being shot. By shooting plaintiff, defendants promoted no security need whatsoever. However, even if the shooting served some small purpose, it remained unconstitutional because it was excessive.

Plaintiff's protection against unreasonable deadly force is also found in the fourteenth amendment's due process clause, which provides a liberty interest against

unjustified intrusions on a prisoner's personal security. Though not every push or shove reaches constitutional dimensions, shooting a person with a shotgun does. The shooting of plaintiff amounted to a bodily intrusion of the most severe kind. Yet, evidence introduced at trial showed that plaintiff's shooting was in no way related to resolving the security breach facing defendants. Even if there was some relationship, there was no need to stop plaintiff's movement by inflicting deadly force upon him, rather than using a less damaging but equally effective option. A jury could properly find that the shooting was unreasonable and done, if not maliciously, at least with reckless disregard for the plaintiff's life and safety.

Regardless of whether defendants' behavior in storming the cellblock with shotguns was professionally acceptable, substantial evidence makes it clear they did not need to shoot plaintiff. Removing this case from jury scrutiny undermines the constitutional fabric of our society. Furthermore, it ignores the heart of the remedy created by 42 U.S.C. Section 1983. The statute was enacted, in part, because of Congress' concern about unjustified violence against citizens by government actors. It provides a remedy for constitutional violations independent of state common law remedies.

Defendants were facing a serious security danger the evening plaintiff was shot. They did need to make delicate predictions and informed decisions without undue delay. Prison officials must be given considerable latitude in achieving security within their institutions. But this deference does not grant officials a license to shoot a prisoner without justification.

II.

Defendants contend that even if their actions did violate plaintiff's constitutional rights, defendants are nonethe-

less immune from liability for damages. However, the issue of qualified immunity is not properly before this Court.

The question presented in the Petition for Certiorari was limited to the merits of whether defendants' actions violated the constitution. The focus of the qualified immunity analysis is entirely different. In determining whether a defendant is entitled to immunity from suit, the Court is only concerned with the state of law at the time of the defendants' actions, and not with the merits of the claim. The question presented by defendants made no mention of, and does not fairly include, any discussion of qualified immunity. Defendants' immunity from suit should not be considered by this Court.

III.

Assuming this Court does reach the question of whether defendants should be immune from liability for their shooting of Albers, the claim of immunity should be rejected. The Court has now developed an objective analysis of the assertion of a qualified immunity defense. If defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known . . .", the immunity defense must fail. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

At the time of plaintiff's shooting by defendants, the law was clearly established that prison officials could not use unreasonable, excessive or unnecessary force against prisoners. The Supreme Court, and a majority of the circuit courts, had held that the eighth and fourteenth amendments prohibited the infliction of unnecessary and wanton pain on a prisoner during confinement.

Defendants contend that their accountability for violating this constitutional duty somehow evaporates since

none of these court decisions presented a situation factually identical to the one faced by defendants—the use of deadly force in quelling a prison riot and rescuing a hostage. Certainly these facts are crucial to the ultimate determination of whether plaintiff's constitutional rights have been violated. However, none of the recent decisions of this Court discussing qualified immunity suggest that such factual identity is necessary in determining whether defendants should be immune from liability when the constitutional duty at issue has been clearly established.

The danger of defendants' argument is that it leads us down a slippery slope: If public officials are immune from suit whenever a clearly established constitutional duty has not been applied to the specific factual context facing those officials, then qualified immunity effectively is transformed into absolute immunity.

Plaintiff's constitutional right to be free from the use of unnecessary or excessive force was clearly established at the time he was shot. Defendants' claim that they should be immune from a lawsuit challenging their violation of this clear right should be rejected.

ARGUMENT

I. **UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, PRISONERS ARE PROTECTED AGAINST THE INTENTIONAL USE OF DEADLY FORCE BY PRISON OFFICERS WHEN THAT FORCE IS GREATER THAN THAT WHICH IS REASONABLY PERCEIVED AS NECESSARY TO MAINTAIN OR RESTORE ORDER.**

This case is about the right of prison officers to use intentional force capable of causing severe injury or death against an unarmed and non-dangerous prisoner. Neither

the eighth amendment's proscription against cruel and unusual punishments nor the fourteenth amendment's due process clause permit the senseless shooting of a prisoner, even during or after a "riot" in which a hostage has been taken.[8]

The Ninth Circuit correctly held that Albers presented sufficient evidence at trial to enable a jury to find that defendants violated his constitutional rights by inflicting force upon him which was "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by [defendants] at the time." *Albers* v. *Whitley*, 743 F.2d at 1375.

There is no "riot" exception to the constitutional principle that law enforcement officers may not subject a person, including a prisoner, to unreasonable deadly force. The fact that officers are faced with more than a "one-on-one" confrontation must be taken into account in deciding upon the force required to restore order. If a hostage is being held, there may be a more compelling need to use deadly force against threatening participants. Perhaps in some settings, the officer cannot distinguish between innocent bystanders and the wrongdoers in which case the direct use of deadly force against an innocent person may be reasonable from a constitutional perspective.

[8] Plaintiff does not object to the State's characterization of the disturbance on cellblock A as a "riot." However, the invocation of this word does not permit prison officers or the court to suspend consideration of the actual necessity for the use of deadly force under the circumstances. It is for the jury to consider the circumstances surrounding the shooting of Albers in deciding whether defendants' use of force against him was justified.

Here, the evidence showed that during the first half hour after the bell rang, ten to twenty prisoners had been breaking furniture. However, by the time Albers was shot, a half hour later, Klenk was the only inmate whose conduct was violent and threatening.

"[P]rison officials must be permitted to take reasonable steps to forestall [violent confrontation]." *Jones* v. *North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977). But an emergency does not grant officers a license to kill or permanently maim persons merely because they are within the vicinity of the disturbance. Rather, this Court's repeated approach in resolving claims under the cruel and unusual punishments clause and due process clause compels a ruling that the reasonableness of defendants' use of deadly force against Albers is subject to constitutional scrutiny through a jury.

A. The Cruel And Unusual Punishments Clause Prohibits The Intentional Use Of Deadly Force Against A Prisoner Unless That Force Is Reasonably Perceived As Necessary.

The eighth amendment's cruel and unusual punishments clause is applicable not only to the terms of criminal sentences, *see e.g.*, *Weems* v. *United States*, 217 U.S. 349 (1910); *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (joint opinion), but also to the treatment of prisoners during confinement. *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (applying eighth amendment analysis to a failure to meet a prisoner's serious medical needs); *Rhodes* v. *Chapman*, 452 U.S. 337 (1981) (reviewing prison conditions such as double-celling). *See also Hutto* v. *Finney*, 437 U.S. 678 (1978).

Although the Court has not specifically addressed a case involving a single incident in which physical force was used against a prisoner, it has said that "prison brutality" is a proper subject for eighth amendment scrutiny. *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977).[9] Indeed,

[9] In drawing this conclusion, the Court referred to Judge Friendly's observation that the cruel and unusual punishments

defendants admit that "where, as here, a lawfully committed prison inmate asserts that his personal security has been unconstitutionally infringed by prison officials the claim properly is analyzed under the Eighth Amendment Cruel and Unusual Punishments Clause." State's Brief at 18-19.

Lower courts have repeatedly held that excessive and unnecessary physical force against a prisoner is constitutionally prohibited. *See, e.g., Bates* v. *Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984); *Albers* v. *Whitley*, 743 F.2d at 1375; *Slakan* v. *Porter*, 737 F.2d 368, 372 (4th Cir. 1984); *Williams* v. *Mussomelli*, 772 F.2d 1130, 1134 (3d Cir. 1983); *Putnam* v. *Gerloff*, 639 F.2d 415, 421 (8th Cir. 1981); *King* v. *Blankenship*, 636 F.2d 70, 73 (4th Cir. 1980); *Martinez* v. *Rosado*, 614 F.2d 829, 832 (2d Cir. 1980); *Furtado* v. *Bishop*, 604 F.2d 80, 95 (1st Cir. 1979); *Clemmons* v. *Greggs*, 509 F.2d 1338, 1340 (5th Cir. 1975); *Suits* v. *Lynch*, 437 F.Supp. 38, 40 (D. Kan. 1977); *see also Spain* v. *Procunier*, 600 F.2d 189, 197 (9th Cir. 1979); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 22 (2d Cir. 1971); *Beishir* v. *Swenson*, 331 F.Supp. 1227, 1234 (W. D. Mo. 1971).

The decisions of this Court regarding the eighth amendment have highlighted the flexible and dynamic manner in which the words "cruel and unusual" must be

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clause:

> can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence . . . is carried out by an executioner, *see Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment. *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

430 U.S. at 669 n.38.

interpreted. *See Gregg* v. *Georgia*, 428 U.S. at 171. The eighth amendment cannot be analyzed through a static test. Rather, it "must draw it meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Prison conditions which involve the "unnecessary and wanton infliction of pain" are cruel and unusual under contemporary standards of decency in violation of the eighth amendment. *Rhodes* v. *Chapman*, 452 U.S. at 346-47. In *Redman* v. *Baxley*, 475 F.Supp. 1111, 1118 (E. D. Mich. 1979), the court defined "wanton" by referring to established authorities.

> 'Wanton', of course, is a legal term of art. The standard definition of a wanton act is 'one done in reckless or callous disregard of, or indifference to, the rights of one or more persons.' 3 Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 85.11. 'Ill will is not a necessary element of a wanton act . . .' *Black's Law Dictionary* (Fourth Ed. 1968) at 1753.

The recognition that ill will is not a necessary element of a wanton act comports with one of this Court's earliest interpretations of the eighth amendment. In *Weems* v. *United States*, 217 U.S. at 373, the Court said: "'Cruelty' within the meaning of the eighth amendment can be an instrument of 'zeal for a purpose, either honest or sinister.'" In effect, if Albers' shooting was unnecessary and the reasonable perception of defendants was that it was unnecessary, then the permanent disability from which plaintiff suffers resulted from the "unnecessary and wanton infliction of pain."

The Ninth Circuit in this case agreed that a "formal intent to punish" is not required to establish a violation of

the cruel and unusual punishments clause. *Albers* v. *Whitley*, 743 F.2d at 1374.[10] But the court of appeals also recognized that the constitutional threshold is not crossed unless the conduct of defendants in using unnecessary and excessive force against Albers amounted to more than negligence. Hence, the court stated:

> [I]f the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel unusual punishment, then the eighth amendment has been violated . . . *see Estelle* v. *Gamble*, 429 U.S. 97, 104-106, ... The ['deliberate indifference'] standard may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners. . . . So applied, 'deliberate indifference' goes well beyond negligence and amounts to the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. at 104 . . . (citations omitted)

Id. at 1375.

We agree that any jury conclusion that defendants' shooting of Albers was reasonably perceived as unnecessary must include a finding that defendants' conduct amounted to more than negligence. The Ninth Circuit preferred the phrase "deliberate indifference" as the standard of culpability which must be met for a use of force claim to reach constitutional dimensions. Other phrases such as "reckless or careless disregard" would be equally appropriate. But there is no support for the State's position that Albers' eighth amendment claim must fail unless

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[10] Although a jury need not conclude that defendants intended to punish Albers to find a constitutional violation, Whitley's order to "shoot the bastards" (Tr. 118) provides a jury with sufficient evidence to infer that this intent existed.

he was inflicted with pain "for the sake of inflicting pain." State's Brief at 24-24.[11]

Whether Albers was subjected to the infliction of unnecessary and wanton pain is a jury question. The "assessment of contemporary values concerning the infliction" of deadly force against Albers requires "that we look to objective indicia that reflect the public attitude" toward the shooting. *See Gregg* v. *Georgia*, 428 U.S. at 173. "[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system" *Id.* at 181. The Chief Justice has emphasized that there is no empirical basis for challenging the general functioning of juries in capital cases or the integrity of jury decisions involving "choosing between life and death in individual cases

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[11] As noted in the above quote, the Ninth Circuit referred to the adequacy of defendants' "emergency plan" or "riot plan." In fact, this "plan" was not in issue at the trial because the district judge denied plaintiff's motion to compel disclosure of it. (R. 17,21,25,26). While there was evidence at the trial suggesting that the strategy of storming the cellblock with shotguns was itself flawed and unreasonable (see, e.g., J.A. 18, Tr. 260-270, 311-14), a primary focus at trial was on the shooting of Albers rather than on defendants' overall strategy for subduing the disturbance.

As stated in plaintiff's Ninth Circuit Brief at 32,

> Most strikingly, the deadly force that was used, resulting in plaintiff's permanent disability, was not consistent with protecting Fitts. Even though defendants' concern was to stop Klenk, no shots were fired at Klenk. Rather, Klenk was allowed to run up from the first floor of the cellblock to cell 201. Whitley and other officers followed Klenk, and within seconds, Klenk was physically subdued by other inmates and officers. The ostensible plan for and manner of Klenk's apprehension was in no way related to defendants' use of deadly force against plaintiff.

Whatever need defendants perceived to carry shotguns into cellblock A, the crucial question is whether they reasonably perceived a need to shoot Albers as he fled upstairs toward his cell.

according to the dictates of community values." *Furman* v. *Georgia*, 408 U.S. 238, 389 (1982) (Burger, C. J., dissenting). A jury which can effectively apply contemporary community values to a life or death decision can certainly decide whether law enforcement officers have reasonably or unreasonably shot an individual.

Plaintiff submitted evidence which would support a jury conclusion that defendants' conduct was unreasonable. To begin with, he was concededly not a participant in the "riot"; indeed, to the extent that he was active, his only involvement in the evening's events was to attempt to dissuade Klenk from continuing his disruptive behavior and to help elderly inmates avoid the possibility of being exposed to tear gas. To this end, he sought to cooperate with the administration.

At the time of the shooting, the major disruption had ceased and Klenk was the only inmate actively resisting authority. Albers had been on the lower tier for only a few minutes when the assault squad entered with shotguns. He had spoken to Whitley just moments before being shot about the need to permit elderly inmates to leave. When he first saw the shotguns and heard the first shot, he ran up the stairs to reach his cell, as defendants expected he would. He received no commands or warnings at any time that would have let him know what to do to avoid being shot.

Plaintiff contends that the shooting served no valid correctional purpose whatsoever. However, even if it did have some small bearing on defendants' goals, it remained unconstitutional because it was "grossly out of proportion" to any correctional need. *See Gregg* v. *Georgia*, 428 U.S. at 174; *see also Rhodes* v. *Chapman*, 452 U.S. at 347. Any possible benefit to immobilizing this fleeing inmate,

whose conduct had been innocent, could in no way justify the life-threatening act of shooting him at close range with a shotgun.

This Court's application of the cruel and unusual punishments clause has long rested on principles of balancing. The Court has repeatedly balanced the severity of a criminal sanction against the severity of the crime to determine whether its imposition violates the eighth amendment because the punishment is excessive. Capital punishment for rape may serve very legitimate penological goals, including deterrence and retribution. Nonetheless, it is unconstitutional because it is disproportionate. *Coker* v. *Georgia*, 433 U.S. 584, 591-600 (1977) (plurality opinion). A twelve year prison term for the crime of falsifying public records may also have some penological benefit but violates the eighth amendment because it is cruel in its excessiveness and unusual in its character. *Weems* v. *United States* 217 U.S. at 373. Even assuming that a punishment makes a measurable contribution to acceptable correctional goals, it will constitute cruel and unusual punishment if it is "excessive." *Gregg* v. *Georgia*, 428 U.S. at 173. In *Rhodes* v. *Chapman*, 452 U.S. at 347, the Court applied this same reasoning to prison conditions.

The State argues that in assessing a claim of unconstitutional punishment under the eighth amendment, "there is no balancing to be done." State's Brief at 30. It asserts that a violation of the eighth amendment cannot occur unless the infliction of punishment makes no measurable contribution to an accepted correctional goal. State's Brief at 34-35. In other words, the State believes that it may inflict the most severe pain and suffering on a prisoner regardless of its necessity as long as it can show that

the conduct serves even the most insignificant penological purpose.

This no-balancing analysis of the eighth amendment is simply wrong. It ignores the balancing test which this Court has repeatedly emphasized is inherent in eighth amendment analysis, whereby the correctional goal is weighed against the degree of pain it causes. *See Weems* v. *United States*, 217 U.S. at 380-81; *Gregg* v. *Georgia*, 428 U.S. at 174; *Coker* v. *Georgia*, 433 U.S. at 591-600; *Rhodes* v. *Chapman*, 452 U.S. at 346.[12].

Plaintiff does not minimize the difficult and dangerous situation faced by defendants. The fact that there had

[12] The State makes disingenuous references to language used in this Court's opinions involving the eighth amendment to support its argument that no balancing of interests is permissible. State's Brief at 24. In *Estelle* v. *Gamble*, this Court did not state that the infliction of pain is "unnecessary" within the meaning of the eighth amendment only when "no one suggests [that it] would serve any penological purpose." The Court indicated that in "less serious cases" suffering may be "unnecessary" when it serves no penological purpose. 429 U.S. at 103. Similarly, in *Furman* v. *Georgia*, Justice Marshall did not say that a "grossly disproportionate" punishment is unconstitutional only when it "serves no valid legislative purpose." Although he properly considered the legislative purpose served by capital punishment, he did so in the context of examining "whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment." 408 U.S. at 342 (Marshall, J., concurring). Justice Marshall found the "entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'" *Id.* at 332. Further, Justice Brennan did not imply that punishment which is "pointless" is only one without any penological purpose. To the contrary, Justice Brennan promoted a clear balancing test:

> The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.

Id. at 279 (citations omitted) (Brennan, J., concurring).

been a riot, that an officer's safety was in question, and that an inmate was armed and dangerous are all factors which a jury may weigh in the determination of whether the shooting of Albers was unnecessary and wanton. Certainly, plaintiff will have a heavy burden of persuasion. However, the question presented is a classic jury issue.

B. The Fourteenth Amendment's Due Process Clause Prohibits The Unreasonable Intrusion On A Prisoner's Personal Security.

In addition to claiming that the use of deadly force against him violated the cruel and unusual punishments clause, plaintiff claims that the shooting violated his rights under the due process clause.[13]

[13] The district court mistakenly did not "understand plaintiff to assert an independent violation of fourteenth amendment due process" *Albers* v. *Whitley*, 546 F.Supp. at 732 n.1, a belief in which the Ninth Circuit joined, basing its decision on the eighth amendment only. *Albers* v. *Whitley*, 743 F.2d at 1374 n.1. However, from this case's inception, plaintiff has argued that his constitutional protection against the use of excessive and unnecessary force, as well as the use of deadly force without meaningful warning, stems from either or both the eighth amendment's cruel and unusual punishments clause and the fourteenth amendment's due process clause. See Complaint (R. 1); First Amended Complaint (R. 52, paragraph 25; J.A. 7); Plaintiff's Second Proposed Pre-Trial Order (R. 51, paragraph VII(1) and (2)); Transcript of Trial (J.A. 27); "Memorandum in Support of Defendants' Motion for Summary Judgment, Section I(c) (R. 48); and Point I at 27-28 of Plaintiff-Appellant's Ninth Circuit Brief. Thus, we agree with the suggestion of the United States that the "constitutionality of petitioners' actions might more properly be measured by the standard that applies to law enforcement officers' conduct generally: whether petitioners violated respondent's due process rights because they used excessive force. . . ." Brief for the United States as Amicus Curiae at 11. Although its "Question Presented" refers to the eighth amendment only, the State appears to recognize that the question cannot be answered without analyzing plaintiff's rights under the due process clause as well. State's Brief at 26-30. Of course,

At the time he was shot, Albers had a liberty interest in personal security under the due process clause. "Among the historic liberties [protected by the due process clause] was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 U.S. at 673. This liberty right is "not extinguished by lawful confinement, even for penal purposes." *Youngberg* v. *Romeo*, 457 U.S. 307, 315 (1982) (citation omitted)

> Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part, dissenting in part). This interest survives criminal conviction and incarceration.

Id. at 316; *see also*, *Robinson* v. *California*, 370 U.S. 660 (1962).[14]

The leading lower court case in the due process adjudication of prisoners' claims of excessive or unwarranted force is *Johnson* v. *Glick*, in which Judge Friendly stated, 481 F.2d at 1032-33:

> [Q]uite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law. . . . Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[15]

Judge Friendly's language has been widely quoted and utilized as both an eighth amendment and due process standard in cases involving prison use of force.[16] This

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plaintiff can rely on any ground properly raised below to support his position that the decision of the Ninth Circuit should be affirmed, even though the court of appeals based its decision on the eighth amendment only. *See United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[14] The State implies that a prisoner's liberty interest in personal security under the due process clause itself is extinguished by the fact of lawful criminal conviction, relying on *Meachum* v. *Fano*, 427 U.S. 215 (1976). State's Brief at 19 nn.7, 8. This claim is erroneous. In *Meachum*, the Court was considering a prisoner's general liberty interest to live where he or she wished. A criminal conviction removes that interest in its entirety. *Id.* at 225. The more specific interest in personal security was not discussed in *Meachum* and, this Court has said, remains intact behind the prison gate. *Youngberg* v. *Romeo*, 457, U.S. 315, *See also*, *Hutto* v. *Finney*, 437 U.S. at 682 nn.4-6.

[15] Judge Friendly also considered whether the eighth amendment applied to a spontaneous attack by a guard which "is 'cruel,' and we hope 'unusual' [but] does not fit any ordinary concept of 'punishment'." However, he did not rule on the eighth amendment question because he found the due process clause to be more suitable for the adjudication of rights of the plaintiff, a pre-trial detainee. Subsequent cases in this Court, however, have established that the eighth amendment would apply to a prisoner who suffers unnecessary and wanton pain from a single attack of undue force. *See Estelle* v. *Gamble*, 452 U.S. at 346-47; *Ingraham* v. *Wright* 430 U.S. at 667.

[16] Cases relying primarily on the eighth amendment for analyzing prison use of force cases are cited *supra*, at page 18 of this brief. The cases relying on the due process clause include, *e.g. United States* v. *Stokes*, 506 F.2d 771 (5th Cir. 1975); *Meredith* v. *State of Arizona*, 523 F.2d 481 (9th Cir. 1975); *Arroyo* v. *Schaefer*, 548 F.2d 47 (2d Cir. 1977); *Ridley* v. *Leavitt*, 631 F.2d 358 (4th Cir. 1980); *Shillingford* v. *Holmes*, 634 F.2d 263 (5th Cir. 1981); *Norris* v. *District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984); *LeBlanc* v. *Foti*, 487 F.Supp. 272 (D. La. 1980).

reliance on *Johnson* is not surprising. Judge Friendly's analysis ultimately rested on the due process prohibition of use of force that "shocks the conscience," *Rochin* v. *California*, 342 U.S. at 172, *quoted in Johnson* v. *Glick*, 481 F.2d at 1033, an analysis which is parallel in its concerns to those of the cruel and unusual punishments clause.

The inquiry suggested by Judge Friendly and adopted throughout the circuits is consistent with the legal standard accepted by the Ninth Circuit here: plaintiff's constitutional rights would "have been violated when the force used is 'so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time,' *Jones* v. *Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2683 . . . (1984)." *Albers* v. *Whitley*, 743 F.2d at 1375. If circumstances such as a "riot" provide prison officials with a reasonable perception of the need to use deadly force against particular prisoners, there is no constitutional violation if those prisoners are shot. On the other hand, the liberty interest in personal security would be hollow indeed if agents of the state could shoot a prisoner, when no reasonable perception warranted such force.[17]

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[17] In *Jones* v. *Mabry*, the Eighth circuit provides useful guidance on how both the eighth and fourteenth amendments may be considered in determining whether prisoners have been subjected to constitutionally impermissible disabilities. Jones and other state prisoners challenged their placement in a special high security risk classification, resulting in substantial restrictions on their movement in the prison. In particular, the prisoners were required to wear leg irons and shackles when out of their cells.

In analyzing the due process issue, the Eighth Circuit noted that the prisoners' special classification was triggered by a series of events over several months in which inmates had flooded their cells and destroyed the plumbing and fixtures, two inmates had escaped, another group of inmates had to be forcibly returned to their cells, and several inmates made an escape attempt, which included the taking of hostages. "We cannot say that the prison authorities' reaction to this situation was excessive or exaggerated' and that the means employed were not so clearly disproportionate, when measured against these purposes [to prevent escapes and maintain security], as to deserve condemnation as 'punitive'." *Id.* at 595. Having found that the restrictions were not violative of due process, the court used the same balancing test to find that they did not constitute cruel and unusual punishment. *Id.* at 596.

Under this well established due process approach, plaintiff's claim should have been permitted to go to the jury. A jury could have found there was no need to shoot Albers, particularly without giving a verbal warning first as he approached the stairs; that if any action at all was needed he could have been pushed aside or even ordered out of the way; and that the shooting, resulting in severe disability, was done, if not "maliciously and sadistically," *Johnson* v. *Glick*, 481 F.2d at 1033, at least with reckless disregard for plaintiff's life and safety. It is difficult to imagine a more reckless act than shooting a person without giving some meaningful opportunity to avoid probable death or permanent disability.

Where the force used is deadly force, the courts must be especially solicitous of the balance between the individual's paramount interest in life and whatever governmental purposes are served by threatening his life. The Court recognized this principle in *Tennessee* v. *Garner*, 469 U.S. ___, 105 S.Ct 1694 (1985), a fourth amendment case.

The right to personal security is protected by the fourth amendment as well as the due process clause itself. *Ingraham* v. *Wright*, 430 U.S. at 673 n.42. Therefore, the balancing test used by the court when reviewing the

infliction of deadly force in *Garner*, should provide guidance for the resolution of Albers' claims.

In *Garner*, the Court held that a Tennessee statute was unconstitutional insofar as it authorized the use of deadly force against an apparently unarmed and non-dangerous fleeing felony suspect. After considering the specific facts presented, the Court then employed a balancing test to determine whether the shooting was constitutionally reasonable.

> To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion' [citations omitted]. We have described 'the balancing of competing interests' as the 'key principle of the Fourth Amendment' [citations omitted]. Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.

105 S. Ct. at 1699.

Recognizing that the "intrusiveness of a seizure by means of deadly force is unmatched," *id.* at 1700, the Court weighed the suspect's fundamental interest in his own life and society's interest in judicial determination of guilt and punishment against the governmental interest in effective law enforcement. In doing so, it held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Id.* at 1701.

Gerald Albers was more fortunate than Edward Garner. Albers was shot in the back of the knee, not in the

back of the head, as was Garner. But in both cases, "we are dealing with intrusions into the human body," *Schmerber* v. *California*, 384 U.S. 757, 767 (1966), of the most severe kind. Albers bled profusely after being shot, losing six pints of the nine to eleven pints of blood normally present in the human body. He applied his own tourniquet with a piece of his clothing, to stop bleeding to death. This encroachment on his personal security is deserving of a balancing of interests equivalent to the test applied to Garner's shooting.[18]

C. Plaintiff Has A Constitutional Claim Actionable Under Section 1983 Regardless Of The Existence Or Similarity Of State Tort Remedies.

The interests asserted by plaintiff are at the heart of the remedy created by 42 U.S.C. Section 1983. In passing the 1871 Ku Klux Klan Act, from which Section 1983 is derived, Congress was concerned about unjustified violence against citizens by government actors. *Briscoe* v. *Lahue*, 460 U.S. 325, 337 (1983). Claims of unjustified force are subject to constitutional scrutiny through Section 1983 whether they involve a pattern or practice or a single incident. *Monroe* v. *Pape*, 365 U.S. 167, 170-71 (1961); *City of Oklahoma City* v. *Tuttle*, 469 U.S. ___, 105 S.Ct. 2427, 2432-33 (1985); *Tennessee* v. *Garner*.

The existence of a constitutional or statutory remedy under Section 1983 is generally determined without reference to the presence or absence of state common law remedies. *See Monroe* v. *Pape* 365 U.S. at 170-71; *see also Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388,

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[18] In contrast with defendants' conduct here, the police officer in *Garner* called out "Police, halt" before shooting the fleeing suspect. *Tennessee* v. *Garner*, 105 S.Ct. at 1697.

394-95 (1971) (implied damage remedy for constitutional violations found; inappropriate to resort to "vagaries of state law" for protection of interests of constitutional stature).

Defendants therefore miss the point when they argue that the court below improperly suggested that constitutional liability could be premised on facts that made out a common law tort. Whether or not plaintiff had a tort claim under state law is irrelvant to whether he had Section 1983 claim under the Constitution. The fact that a tort may also be made out by the evidence presented does not detract from the constitutional nature of the injury. After all, as this Court has observed, Section 1983 created "a species of tort liability." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). It "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. at 187.[19]

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[19] State tort law is not made any more relevant to this case by *Parratt* v. *Taylor*, 451 U.S. 527 (1981), holding that due process is satisfied when a state remedy is available for a negligent property deprivation. Section 1983 was initially designed to provide a federal remedy where state law was inadequate or, though adequate in theory, was not available in practice. *McNeese* v. *Board of Education for Community Unit School District 187 Cahokia Illinois*, 373 U.S. 669, 672 (1963). The due process claim asserted by plaintiff is substantive, not procedural, in nature. That is, the constitutional evil complained of is the unwarranted shooting, not the failure to provide a hearing before or after the shooting. See *Youngberg* v. *Romeo*, 457 U.S. at 315 (due process provides substantive as well as procedural protections from excessive physical restraints); *Ingraham* v. *Wright*, 430 U.S. at 659 n.12 (procedural due process claim adjudicated, substantive due process claim explicitly reserved); *Parratt* v. *Taylor*, 451 U.S. at 552-53 (Powell, J., concurring) ("The Due Process Clause imposed substantive limitations on state action and under proper circumstances these limitations may extend to intentional and malicious deprivations even where compensation is available under state law.")

Moreover, there is doubt that the doctrine of *Parratt* has application to intentional acts resulting in a deprivation of liberty. That question is not presented in this proceeding. Furthermore, both the district court and court of appeals held that plaintiff has no state law remedy because of the immunity provided to state bodies and employees for "any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of the foregoing." Or. Rev. Stat. Section 30.265(3)(e). *Albers* v. *Whitley*, 546 F.Supp. at 737-739; *Albers* v. *Whitley*, 743 F.2d at 1377.

Examination of the cases cited in sections A and B, *supra*, make it clear that this Court and the lower federal courts have consistently resorted to an independent constitutional analysis in defining prisoner claims of unjust treatment under both the cruel and unusual punishments clause and the due process clauses. In fact, there is significant divergence between common law tort standards and the constitutional standard for unreasonable or excessive force. At common law, a battery is an intentional and unpermitted bodily contact, regardless of whether it is caused by hostile intent and no matter how trivial. *See* Prosser and Keeton on Torts, Section 9 (5th ed. 1984); Restatement (Second) of Torts, Section 13. We agree with Judge Friendly's statement in *Johnson* v. *Glick* that the constitutional standard is more exacting and that "not every push or shove" violates a prisoner's constitutional rights, regardless of its status under state tort law. This reasoning applies equally to claims under the due process and the cruel and unusual punishments clauses.

D. Applying The Appropriate Constitutional Standard To This Case, Sufficient Evidence Was Presented At Trial To Allow A Jury To Conclude That Plaintiff's Constitutional Rights Were Violated By Defendants' Use Of Deadly Force Against Him.

Sufficient evidence was introduced at trial for a jury to conclude that defendants' use of deadly force against Gerald Albers was totally unwarranted. Even if some force was justified under the circumstances, the use of deadly force against plaintiff was "grossly out of proportion to the security needs." *Gregg* v. *Georgia*, 428 U.S. at 174.

The State emphasizes the "[d]elicate predictions and informed decisions" which defendants had to make "swiftly in the attempt to accommodate the conflicting safety interests of the hostage, prison personnel, and the inmates." State's Brief at 10-11. We fail to see how the safety interests of the various persons present at the Oregon State Penitentiary on June 27, 1980 were "conflicting." With respect to the case here, it was simply unnecessary to use force against Albers, particularly deadly force, to protect Officer Fitts.

There is no dispute that the defendants were facing a serious security danger that evening. They did need to make delicate predictions and informed decisions without undue delay. But that does not excuse an unjustified shooting of a harmless prisoner.[20]

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[20] The Second Circuit realized this when upholding the use of tear gas in a detention facility, a less severe use of force than firearms:

> The prison authorities here were suddenly confronted with an obstreperous inmate to whose aid others might come if released from their cells. The avoidance of a riot that might be difficult to quell is surely a *desideratum* of a reasonable prison administration. To be sure, emergency dos not excuse irresponsibility. *Thus if bullets had been fired in a fashion so indiscriminate as to inflict bodily harm on innocent inmates, the civil rights issue would be different.* (emphasis supplied)

Arroyo v. *Shaefer*, 548 F.2d at 50.

The State draws a false picture of the danger defendants were facing when they shot Albers. Defendants knew or should have known that Albers was unarmed and non-dangerous. He was known to be a well-behaved prisoner (J.A. 18) and he was doing nothing to refute that reputation. Whitley had been inside the cellblock on at least three occasions before Albers even appeared in the open area in front of the lower tier cells. Whitley and Albers talked just minutes before the shooting, with Albers asking Whitley for the key to the steel-barred door so elderly prisoners in the "medical cells" could leave the cellblock. Whitley responded that he could not find the key, and left, saying that he would return with it (Tr. 116-118, 224, 580). Whitley could have told Albers to return to his cell rather than respond in a way which would insure his presence in the open area when the shooting began. Such an order itself would certainly not have shown the hand of defendants so that they would lose any possible element of surprise. In any event, defendants knew that Klenk and other prisoners were aware that firearms might be used since some had already seen the assault squad assemble with shotguns (Tr. 166-67, 173, 414-15).

Defendants also knew that the first shot fired at the wall would result in Albers running up the stairs back to his cell (Tr. 218-219, 247, 400, 458, 460-61). Yet, no officers instructed him to fall to the ground, to stay put, to get away from the stairs, or provided any other orders as to how he could avoid being shot (Tr. 241, 460-461, J.A. 17 paragraph 23).

Again, defendants' viewed Klenk as the real danger. Other prisoners who had broken furniture earlier that evening were just "milling around" (Tr. 188). Neither Albers nor any other prisoner exhibited support for Klenk. To the contrary, the two prisoners who were inside the same cell as Officer Fitts told Whitley that they would prevent any harm to Fitts and met their promise (J.A. 16-17, paragraph 18 and 24).

Plaintiff should be given the opportunity to have a jury decide whether his being shot unreasonably deprived him of his liberty interest in personal security, *Youngberg* v. *Romeo*, 457 U.S. at 315, or amounted to an "unnecessary and wanton infliction of pain." *Rhodes* v. *Chapman*, 452 U.S. at 346. Particularly when the use of deadly force is involved, our Constitution mandates public scrutiny. Such "power [must not] be tempted to cruelty." *See Weems* v. *United States*, 217 U.S. at 373. It has been said that "the Eighth Amendment is our insulation from our baser selves . . . [O]nly in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a constitution." *Furman* v. *Georgia*, 408 U.S. at 345 (Marshall, J. concurring). Defendants seek to hide behind a shield against which the public cannot scrutinize their conduct.

"The continuing guarantee of . . . [various constitutional rights] to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society." *Hudson* v. *Palmer*, 468 U.S. ___, 104 S.Ct. 3194, 3198-99 (1984). The State's position that they can use the most powerful force available against an individual—deadly force—without any public scrutiny whatsoever, ignores this essential character of our society and must be rejected.

II. THE ISSUE OF DEFENDANTS' QUALIFIED IMMUNITY HAS NOT PROPERLY BEEN RAISED BEFORE THIS COURT.

Supreme Court Rule 21(1)(a) requires that a Petition for Writ of Certiorari shall state the questions presented for review, and that "only the questions set forth in the Petition or fairly included therein will be considered by the Court." In this case, the question presented in the Petition for Certiorari and issues fairly included therein were limited to the merits of whether defendants' actions constituted a constitutional violation. No mention was made of the issue of defendants' qualified immunity. Though this question is set forth as a "question presented" in the *amicus* Brief for the United States, we are aware of no authority allowing an *amicus curiae* to enlarge the issues presented by the Petition for Certiorari.

The issue of qualified immunity has specifically been addressed by this Court in several recent decisions. *Harlow* v. *Fitzgerald*, 457 U.S. 800; *Davis* v. *Scherer*, 468 U.S. ___, 104 S.Ct. 3012 (1984); *Mitchell* v. *Forsyth*, 469 U.S. ___, 105 S.Ct. 2806 (1985). Those cases make clear that in evaluating a qualified immunity defense, the Court's inquiry should not be of the merits of a claim, but rather of the state of the law at the time of defendants' actions. "The entitlement is an *immunity from suit* rather than a mere defense to liability . . ." *Id.* at 2816. The question of qualified immunity, then, is conceptually distinct from the question presented in the Petition for Certiorari in this case, and not "fairly included therein." *Procunier* v. *Navarette*, 434 U.S. 555, 567 (1978) (Burger, C.J., dissenting).

In *Harlow*, *Davis* and *Mitchell*, the questions presented to the court in the Petitions for Certiorari specifi-

cally included the issue of qualified immunity. *Harlow*, 457 U.S. at 806; *Davis*, 104 S.Ct. at 3017; *Mitchell*, 105 S.Ct. at 2809. That was not the case in *Procunier*, where the Court's granting the Petition for Certiorari was limited to the question of whether defendant's negligent interference with a claimed constitutional right stated a cause of action under 42 U.S.C. Section 1983. Nonetheless, in its decision in *Procunier*, the Court did discuss the issue of qualified immunity. However, at the time of that decision, the Court's analysis of the qualified immunity defense included a subjective component which involved the same analysis as the question on which the Court did in fact grant certiorari. The Court therefore treated the qualified immunity question "as a subsidiary issue, fairly comprised by the question which was in fact presented." *Id.* at 559 n.6.

This aspect of the Court's decision in *Procunier* can be distinguished from the instant case insofar as the qualified immunity analysis no longer involves a subjective component. The determination of whether defendants are entitled to claim immunity is completely separate from whether their actions constituted a constitutional violation. This determination is not "fairly included" in the question in defendants' Petition for Writ of Certiorari. The issue of qualified immunity, therefore, is not properly before the Court and should not be considered.

III. THE QUALIFIED IMMUNITY DEFENSE SHOULD NOT BE AVAILABLE TO DEFENDANTS, SINCE AT THE TIME OF THEIR ACTIONS, THE LAW WAS CLEARLY ESTABLISHED THAT PRISON OFFICIALS COULD NOT USE UNREASONABLE, EXCESSIVE OR UNNECESSARY DEADLY FORCE AGAINST PRISONERS.

Prison officials have a qualified immunity from liability in damage actions brought under 42 U.S.C. Section 1983.

Procunier v. *Navarette*, 434 U.S. at 561. Whether defendants should be afforded this insulation from liability is essentially an objective inquiry: If defendants' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known," the immunity defense must fail. *Harlow* v. *Fitzgerald*, 457 U.S. at 818; *see also Davis* v. *Scherer*, 104 S.Ct. 3012; *Mitchell* v. *Forsyth*, 105 S.Ct. 2806.[21] At the same time, where clearly established rights are not implicated, officials must be able to act "with independence and without fear of consequences . . ."—either the consequences stemming from the fear of liability for money damages, or from the general costs of being subjected to the risks of trial. *Id.* at 2815.

At the time of plaintiff's shooting by defendants, the law was clearly established that prison officials could not use unreasonable, excessive or unnecessary force against prisoners. *See* Point I, *supra; see also Slakan* v. *Porter*, 737 F.2d 368 (4th Cir. 1984). This Court had held that

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[21] In fact, *Harlow*, establishes a progressive, two-level inquiry. First, was the law clearly established at the time? If the answer to this threshold question is no, the official is immune. If the answer is yes, the immunity defense ordinarily should fail unless the official claims "extraordinary circumstances" and can prove that he neither knew nor should have known that his acts invaded settled legal rights. In this case, the State cannot make an "extraordinary circumstances" argument. Indeed, such an argument would be somewhat implausible given the State's administrative rule which explicitly adopts the constitutional standard urged by plaintiff. The Corrections Division's "Rule Governing Process for Use of Physical Force, weapons, Chemical Agents, and/or Restraints" states that ". . . [P]hysical force will be used only with due regard for the safety of staff and the safety of others. Only the minimum degree of physical force which is necessary on any particular occasion will be used." (J.A. 18)

unjustified intrusions on personal security was an historic liberty interest protected by the due process clause, and that the eighth amendment protected prisoners against brutality during confinement. *Ingraham* v. *Wright*, 430 U.S. at 669, 673. The infliction of unnecessary and wanton pain on an individual prisoner had been found to violate the eighth amendment. *Estelle* v. *Gamble*, 429 U.S. at 104.

The leading case of *Johnson* v. *Glick* was decided seven years before Albers' shooting. Judge Friendly's observation that the Constitution prohibits undue force by law enforcement officers had been cited with approval throughout the circuits. *E.g.*, *Hall* v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Martinez* v. *Rosado*, 614 F.2d at 832; *Furtado* v. *Bishop*, 604 F.2d at 95; *Meredith* v. *Arizona*, 523 F.2d at 483; *U.S.* v. *Stokes*, 506 F.2d at 776; *Clark* v. *Ziedonis*, 513 F.2d 79, 80 (7th Cir. 1975); *Suits* v. *Lynch*, 437 F.Supp. at 40; *Jackson* v. *Allen*, 376 F.Supp. 1393, 1396 (E.D. Ark. 1974); and *Reed* v. *Philadelphia Housing Authority*, 372 F.Supp. 686, 689 (E. D. Pa. 1974). *Cf.*, *Spain* v. *Procuiner*, 600 F.2d at 196 (use of tear gas on inmates must be limited to avoid 'wanton infliction of pain'); *Clemmons* v. *Greggs* 509 F.2d at 1341 (limits of force used against prisoners to force which is reasonably necessary); and *Inmates of Attica* v. *Rockefeller*, 453 F.2d at 22 (beatings and torture of prisoners 'wholly beyond any force needed to maintain order').[22]

During the aftermath of the Attica uprising, the Second Circuit issued an injunction against physical abuse of

[22] Although the general legal analysis of the Second Circuit, in *Attica*, is applicable to this case, the specific security breach facing defendants when Albers was shot had nothing in common with the Attica uprising or its aftermath.

prisoners which "was wholly beyond any force needed to maintain order." *Id.* at 22. In 1979 the Ninth Circuit emphasized that the "necessity for subjecting a prisoner to a painful device is a measure of its cruelty" under the eighth amendment. *Spain* v. *Procunier*, 600 F.2d at 197. Previously, the Ninth Circuit had relied on this Court's ruling in *Rochin* v. *California* and Judge Friendly's analysis to conclude that the due process clause protected a prisoner against an unprovoked assault and battery by a guard. *Meredith* v. *State of Arizona*, 523 F.2d at 483-84.

Before defendants acted, then, their constitutional duty was clear. There was no need for them to predict "the future course of constitutional law." *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975); *Procunier* v. *Navarette*, 434 U.S. at 562 (1978). At the same time, they had no right to disregard clearly established constitutional principles. This Court has pointedly made clear that the concept of qualified immunity provides "no license to lawless conduct. . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Harlow* v. *Fitzgerald*, 457 U.S. at 819.

In finding that the constitutional standard was not clear at the time of defendants' actions, the district court improperly broadened *Harlow's* requirement that the legal duty be clear, by encompassing a factual component. The inquiry proposed by the district court is not solely the clarity of the constitutional duty regarding the use of deadly force against prisoners. To overcome the immunity defense, according to the district court, plaintiff must also prove that the duty had previously been applied in a factually identical case—one involving the use of deadly force in "quelling a prison riot and rescuing a hostage."

Albers v. *Whitley*, 546 F.Supp. at 737. Defendants and the United States similarly espouse this expansion of *Harlow*. State's Brief at 45; Brief for the United States as Amicus Curiae at 25. However, this Court's development of an objective test for evaluating the assertion of the qualified immunity defense has never required the degree of factual identity suggested by defendants.[23]

Defendants' reliance on several of this Court's recent decisions discussing qualified immunity is misplaced. *Procunier* v. *Navarette* was a damage action against prison officials for interfering with a prisoner's mail, alleging that such interference was a violation of the first and fourteenth amendments. In holding that the officials were immune from suit, the Supreme Court found that at the time in question, the first and fourteenth amendments had not been extended to the protection of state prisoners; correspondence. *Id.* at 565. This contrasts with the situation in plaintiff's case. When Albers was shot in 1980, the eighth and fourteenth amendments had clearly been applied to prohibit the unreasonable use of deadly force against prisoners.

Defendants' reliance on *Davis* v. *Scherer* is also inappropriate. Though the law at the time Davis, a highway patrol officer, was fired required that he be afforded *some* procedural due process protections, which he received, it was not clearly established that he was entitled to a pretermination or prompt post-termination hearing. 104

[23] In fact, in *Little* v. *Walker*, 552 F.2d 193, 197 (7th Cir. 1977), the court emphasized that the defendant:

> cannot hide behind a claim that the particular factual predicate in question has never appeared in *haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism.

S.Ct. at 3018-19. Again, this differs from plaintiff's case. At the time Albers was shot, the extent of his constitutional rights was clearly established—he was protected from the use of unreasonable, excessive or unnecessary deadly force.

The most recent Supreme Court decision cited by defendants in support of their argument for immunity is *Mitchell* v. *Forsyth*. In that case, the Court considered a suit for damages stemming from a warrantless wiretap in violation of the fourth amendment. Prior to the Court's decision, but after the defendants' conduct at issue in *Mitchell*, the Court had ruled that the fourth amendment did not permit the use of warrantless wiretaps in cases involving domestic threats to the national security. *United States* v. *United States District Court*, 407 U.S. 297 (1972) (*Keith*). The question in *Mitchell* was whether the defendant was nonetheless entitled to qualified immunity from suit; the Court concluded that he was.

In reaching its decision, the Court held that at the time of Mitchell's actions, the law was not clearly established that warrantless wiretaps in cases involving threats to national security were violative of the fourth amendment. That question had been expressly left unanswered in *Katz* v. *United States*, 389 U.S. 347 (1967), the seminal decision holding that electronic surveilance unaccompanied by any physical trespass constituted a search subject to the fourth amendment's restrictions. Subsequent to *Katz*, Congress failed to answer the question of executive authority to order warrantless national security wiretaps in Title III of the Omnibus Crime Control and Safe Streets Act of 1968; uncertainty was also reflected in the conflicting decisions of the lower federal courts. *Mitchell* v. *Forsyth*, 105 S.Ct. at 2819. Given this legislative and judicial uncertainty, and further given the fact that the

Supreme Court had specifically suggested that the issue of wiretaps in national security cases may have to be treated separately, the Court's decision in *Mitchell* seemed inevitable.

The situation in this case is easily distinguishable from *Mitchell*. Prior to defendants' actions, neither this Court, nor any lower federal court, had ever suggested that unreasonable, excessive or unnecessary deadly force could be used against a prisoner in a "riot" situation. The clearly established law at the time of defendants' conduct was that no such "riot" exception existed. To argue that constitutional protections somehow evaporated merely because a serious security breach existed is absurd, and contrary to the constitutional fabric of this country. *Cf.*, *Tennessee* v. *Garner*, *Keith*.

Defendants' factual identity argument must fail not only because it has no basis in law, but also because of the consequences which would result from its application. To allow the immunity simply because a factual situation had not been previously presented to the courts would decimate the important policy, emphasized by the court in *Harlow*, of holding officials liable for violations of clearly established law.

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. *Butz* v. *Economou*, 438 U.S. at 506 . . .; see *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.").

Harlow, 457 U.S. at 814. To the contrary, such a principle might lead public officials to believe they may have "one bite of the apple" for a constitutional violation in any particular factual setting.

Finally, the United States suggests that particularly in cases involving such broad standards as "due process," "equal protection," or "cruel and unusual punishment," the circuit courts of appeals have required factual identity between the case before the court and relevant precedents. In fact, the decisions cited in support of this proposition hold nothing of the kind. Indeed, in *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), the court noted that a requirement that there be *no* distinguishing facts between the instant case and existing precedent "would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation." In *Hobson* the first and fifth amendment principles relied on by plaintiffs were found by the court to have been well established, and defendants' assertion of immunity was rejected. *Id.* at 29.

Similarly, in *Bates* v. *Jean*, a Seventh Circuit decision involving a prisoner's action against four federal correctional officials for damages allegedly suffered in a beating, the court refused to rule that defendants were immune from suit. According to the court, it was clearly established at the time of defendants' actions in that case that the Constitution prohibited prison officials from intentionally inflicting "excessive or grossly severe punishment." 745 F.2d at 1152 (citations omitted).

In sum, plaintiff's constitutional right to be free from the use of unnecessary or excessive force was clearly established when defendants acted in this case. The claim of qualified immunity should be rejected.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

GENE B. MECHANIC
(Appointed by this Court)
STEVEN GOLDBERG
ALICE GOLDSTEIN
808 S.W. Alder, Suite 200
Portland, Oregon 97205
(503) 224-2372
Counsel for Respondent

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No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, et al.,

Petitioners,

v.

GERALD ALBERS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
*JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

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REPLY BRIEF

ARGUMENT

I. ALBERS HAS FAILED TO DEMONSTRATE THAT, UNDER A CORRECT FORMULATION OF THE EIGHTH AMENDMENT STANDARD, HE WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

There is very little common ground in the positions taken by the parties and their respective amici in this case.[1] We disagree with Albers on the realities of the situation confronted by defendant prison officials; we disagree on the applicable constitutional standard by which to test the decision to use force; and we disagree on the role juries should play in reviewing the judgments of prison officials who respond to prison security crises.

Any surface appeal of Albers' arguments evaporates when his support for them is scrutinized. His description of the events surrounding the riot paints an image of a minimally disruptive or dangerous setting, but the picture inappropriately is drawn from misleadingly selective references to the record. Albers' proposed constitutional standard disregards relevant principles and precedent, and neglects important policy-based concerns that should inform resolution of this issue. He argues for permitting juries subjectively to reassess the desirability of official security measures when this Court has disapproved of judges engaging in identical inquiries. Although Albers is not so bold as to state it directly, his position calls on this Court to recast the values of the

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[1] The Correctional Association of New York and the Pennsylvania Prison Society jointly have filed an amicus curiae brief supporting Albers. The United States Solicitor General has filed a brief as amicus curiae supporting the State of Oregon.

Eighth Amendment. Ultimately, he would permit the wisdom of nearly every prison security decision to be arbitrated by a jury, which may base liability on its choice between competing penological philosophies and theories, or its hindsight determination of what action might have been "best."

A. The facts recited by Albers place a misleading gloss on the difficult, split-second decisions prison officials were required to make in this prison security emergency.

The central theme of Albers' brief is that, viewed in the light most favorable to him, this is a case of a wholly unjustified shooting of a nondangerous inmate. Albers describes himself as a model prisoner and an innocent bystander assisting the administration at the time he was shot. He creates an image of an essentially calm cellblock in which "honor" inmates were milling around harmlessly and posing no danger. Richard Klenk, he asserts, was the sole, out-of-control inmate and therefore the only inmate whose action should have concerned officials when they attempted to regain control.

An unsanitized review of the undisputed facts reveals a very different picture, one that more accurately highlights the risks, uncertainties and dangers that confronted the institution officials. True, these were honor block inmates. But that means only that these inmates, while in the tightly controlled environment of this maximum security institution, had not broken any disciplinary rules for six months. (Tr. 102).[2] The cellblock was still a maximum security area, and the inmates housed there were maximum security prisoners. In short, the inmates in A Block were violent, dangerous felony offenders

[2] In this brief, "Tr." refers to the transcript of the trial.

who did not inspire trust, especially when tight institutional controls were not in place.[3]

Contrary to Albers' characterization, Richard Klenk was hardly the only armed or out-of-control inmate. Many if not most of the inmates, including Albers, knowingly refused the cell-in order.[4] (Tr. 104, 187-88). Several inmates wreaked wholesale destruction of furniture, glass and mirrors on the block until all of the property readily available was, to use Albers' own description, "demolished." (Tr. 140; *see generally* Tr. 104-05, 159, 210). According to Albers and the inmate witnesses, a fight among three inmates left one of them lying on the floor, incapacitated and bleeding, (Tr. 107); inmates had armed themselves with pieces of broken furniture, and Albers speculated they did so to protect themselves from other inmates, (Tr. 108); another inmate believed that some armed themselves for their own protection, while others armed themselves so they could join in, (Tr. 530); in general, the inmates were tense, abnormally aggressive, and visibly fearful, (Tr. 113, 172); inmates in the block feared each other as well as staff, (Tr. 168-69); one inmate candidly acknowledged he was afraid for his life, and it was other inmates, not staff,

[3] This reality is amply demonstrated by the criminal records of the A Block inmates called to testify. Their criminal convictions included assault with a dangerous weapon, sexual abuse, felony murder, murder, burglary and multiple convictions for escape, armed robbery, rape and sodomy. (Tr. 159, 180-81, 189, 222, 454, 521). Albers himself had prior convictions for drug activities, ex-convict in possession of firearms, first degree burglary, and both first and second degree escape; at the time of the riot, Albers was incarcerated for armed robbery. (Tr. 92, 149-52). Significantly, one of his escapes was from Oregon State Penitentiary. (Tr. 151).

[4] Albers emphasizes in his brief that he was *at* his cell during much of the riot. (*See* Resp. Br. at 4). This suggests he was *in* his cell, which is untrue. Throughout most of the disturbance, he was out on the tier with other inmates and was in violation of the cell-in order. Albers went into his cell only temporarily to take precautions to avoid the effects of tear gas. (Tr. 110).

whom he feared, (Tr. 522-23); and the inmate who "protected" Officer Fitts in cell 201 was concerned throughout the incident for the guard's safety and doubted his own ability to protect Fitts from the other 200 inmates on the block or from Klenk who was armed with a knife, (Tr. 170-71).

Also contrary to Albers' assertions, Richard Klenk was not the only inmate whom officials believed presented a danger. As Whitley testified, Klenk was his primary concern at the moment officials entered to free Fitts, because Klenk was known to be armed and expressly had threatened Fitts' life. (Tr. 231). But in a maximum security institution, every prisoner is considered potentially dangerous when inmates have taken control, as Whitley testified (Tr. 420-21) and as common sense would dictate. To suggest that under these circumstances Klenk either was or should have been the officials' only concern belies both the record and reason.[5]

The crucial events took place in twenty seconds or less. (Tr. 384). The prison officials carefully orchestrated their entry into the cellblock to regain maximum control in a minimum amount of time with minimum injury to staff, inmates and the hostage. With Klenk downstairs and away from the hostage cell, Whitley started over the barricade. Klenk turned and ran towards the cell where the hostage was held. (Tr. 376). Whitley literally hit the ground running (Tr. 232), and found himself in a foot race with Klenk to reach the cell. (Tr. 379). Kennicott, following Whitley, fired a warning shot just as Whitley started over. (Tr. 461). As Kennicott was climbing the barrier, some inmates

[5] Additionally, Klenk's representations to officials indicated that he was not acting alone and that he and his supporters were a threat to the lives of unpopular groups of inmates. Whitley testified: "[Klenk] made comments to that effect, that 'We're going to kill the goddamed 'rapos' and 'niggers,' and one 'rapo' has already been killed.' " (Tr. 372).

ran up the stairs ahead of Whitley; Kennicott fired a second shot which hit the post on the corner of the stairway. (Tr. 462). Whitley ran past Albers and headed up the stairs. Albers turned and started up the stairs after Whitley. Kennicott, in that split-second, had two choices: He could shoot low, pursuant to orders, and try to stop Albers from running up the stairs behind Whitley, or he could assume that Albers would run past cell 201 without harming Whitley or the hostage. Kennicott fired, hitting Albers in the knee. Whitley successfully got to cell 201 and tackled Klenk just as Klenk was lunging through the doorway and was within a foot and a half of the hostage. (Tr. 490). Whitley was back downstairs with Klenk in custody before the eighth guard in the lineup had gotten over the barricade and into the cellblock. (Tr. 417-18).[6]

The record in this case graphically illustrates a truth about maximum security institutions in general: They house extraordinarily dangerous people. When the tight controls normally in place are overthrown, the setting is volatile and the actions of inmates, both individually and collectively, are

[6] Albers inaccurately states that the defendant officials *knew* that the first warning shot would cause Albers to run up the stairs back to his cell. (Resp. Br. at 35). Whitley, who instructed Kennicott to fire a warning shot, wanted to alert inmates that they were coming in with force to get the hostage, and he wanted inmates to "disburse." (Tr. 236, 397). Whitley thought the inmates' reactions would depend on where they were at the time. (Tr. 240). He believed many of the inmates in the front area near the barricade would fall face down on the concrete or head into the nearby open offices and day room in response to the first shot. (Tr. 236, 406). Whitley had other officers behind Kennicott for the very purpose of protecting Kennicott and himself from an attack from behind by those inmates. (Tr. 236, 418). Whitley thought the most reasonable response of inmates in the front area would be to head for the day room, but he acknowledged the *possibility* that some of them might head up the stairs to go back to their cells. (Tr. 236, 400). He gave the order to shoot low at any inmate headed up the stairs because it also was possible that such an inmate would assist Klenk or attack Whitley from the rear. (Tr. 401).

difficult to predict. When Albers bolted up the stairs after Whitley, it was impossible for officials to know or find out whether his intentions were benign. Albers' position necessarily is that, because there had not been warnings and he had not demonstrated overtly that he was a threat, officials constitutionally were obligated to assume he would not harm Whitley or the hostage, and they constitutionally were required to ignore the distinct possibility that he would.

In effect, Albers seeks to have this Court close its eyes to the realities of a maximum security prison and to the risks and uncertainties inherent in restoring security where inmates have seized control. In other challenges to prison security measures this Court has been steadfast in its refusal to do so. The Court consistently has demanded that constitutional scrutiny accommodate the unique setting of a prison and give deference to the expertise of prison administrators. The gloss that Albers places on the facts of this case should not distract the Court from a realistic portrait of the inmates who were involved in this crisis and a realistic view of the dangers with which officials were confronted.

B. Albers' "balancing of values" and reasonableness analysis has no basis in Eighth Amendment principles or in this Court's jurisprudence.

1. Albers and his amici argue, in essence, for a constitutional standard based on "reasonableness." Under their analysis, the jury balances an inmate's interest in avoiding injurious force against the correctional purpose to be served by its use. An inmate's individual culpability and alternatives to force are considered in assessing the weight of the correctional purpose. If the jury believes some lesser amount of force would have sufficed, it may find that the force used was unconstitutionally excessive and it may impose damages liability. Despite his disclaimers, Albers' reasonableness standard reduces to a tort analysis and makes a jury issue of virtually any injury to an inmate inflicted by prison officials.

Albers' discussion and analysis of the relevant constitutional values and case law is at best perfunctory. He asserts that "[t]his Court's application of the cruel and unusual punishments clause has long rested on principles of balancing." (Resp. Br. at 23). He relies exclusively on cases involving disproportionality challenges to criminal sentences, when by his own acknowledgment this case is aligned with those involving Eighth Amendment challenges to treatment of prisoners during confinement.[7] (*See* Resp. Br. at 17-19).

Albers thus relies on inapposite cases. They also fail to support the analysis he advocates. Disproportionality is a legal question. Sentences are not invalidated on an *ad hoc* factual basis by juries; if they are invalidated at all, they are invalidated categorically and as a matter of law. Nor does disproportionality turn on subjective assessments that a lesser penalty would suffice, *see Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality); or on judicial disagreement with legislative judgments on the effectiveness of a criminal sanction, *id.* at 175-76, *Weems v. United States*, 217 U.S. 349, 378 (1910); or on some degree of excessiveness, however slight, *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (sentence must be *grossly* disproportionate for constitutional violation to arise). In short, a disproportionality inquiry into whether a category of crime should receive a certain sanction simply is not based

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[7] Albers also cites *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and asserts that disproportionality analysis has been applied to prison condition challenges. *Rhodes*, however, merely cites in its discussion of general Eighth Amendment principles the same sentencing cases cited by Albers. *Rhodes* does not apply a disproportionality test. Such a test poses inherent difficulties and limitations in the context of conditions that apply uniformly to an entire population of inmates incarcerated for a range of criminal activities. We do not read *Rhodes* as support for individualized comparisons of the harshness of a condition of incarceration in relation to the nature of the crime warranting imprisonment.

upon the type of individualized "balancing" analysis that Albers advocates.

Albers' formulation forces him totally to disregard the holding in *Estelle v. Gamble*, 429 U.S. 97 (1976). *Estelle* explained the duty of prison officials to provide medical care to inmates, and the circumstances under which a breach of that duty rises to the level of "cruel and unusual" punishment. Then, as now, contemporary standards unquestionably required "reasonable" medical care, commensurate with the skill and training of the provider; breach of that duty was actionable malpractice.[8] But this Court soundly refused to transform societal obligations of reasonable care into an Eighth Amendment imperative. 429 U.S. at 105-07. The Court held that to establish a constitutional violation, an inmate must show that due to deliberate indifference and not an exercise of professional judgment, his serious medical needs went unmet.[9] *Id.* at 104-06 and n. 10.

Estelle implicitly makes the point that is central to our argument. The Eighth Amendment reflects a different value

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[8] *See generally* Prosser and Keeton on Torts, § 32, p. 185-93 (5th ed. 1984).

[9] We agree with the United States Solicitor General, who in his amicus brief points out the difficulty of the deliberate indifference standard where, as here, officials must take into account more than a single affirmative obligation. (Am. Br. at 21). Albers disclaims his ability to understand how the obligations of officials in this context are multiple or competing, but a hypothetical illustrates the point.

Assume that Kennicott, uncertain but suspicious of Albers' intentions in immediately following Whitley up the stairs, is deferential to his personal safety interests and does not use force to stop him. Instead of going to his cell, Albers assists Klenk in getting into cell 201. In the process, he and Klenk seriously or fatally injure one of the inmates trying to protect the hostage guard. In an effort to be solicitous of Albers' interests, have officials been "deliberately indifferent" to the guard's safety or that of inmates assisting in his protection? Under Albers' analysis, a jury could find that they were. Any action officials take thus subjects them to potential liability.

than do tort notions of the duty of reasonable care owed between individuals in society generally. Unlike tort law, the Eighth Amendment is not designed to allocate losses arising out of human activities by basing liability upon socially "unreasonable" conduct.[10] Instead, as we have already argued at length, the Eighth Amendment is an absolute limitation on government's authority to punish. It draws an outer boundary and reflects the value that punishment which clearly goes beyond the legitimate aims of our justice system, and is wantonly inflicted, is not to be tolerated.

The amicus brief filed in Albers' support thus misses the point with its lengthy discussion of statutes, model codes and administrative regulations restricting the use of deadly or injurious force to circumstances where it is reasonably necessary and where reasonable alternatives have been exhausted. Such a standard is unobjectionable as a matter of policy, as is a standard of "reasonable" medical care. But this Court has never held that the Eighth Amendment is violated whenever an inmate is seriously injured as a result of a breach of a duty of reasonable care. Nor should it.

Cruelty, wantonness, or an equivalent punitive component, are crucial elements of the constitutional calculus. Strikingly absent from the record and from Albers' factual argument is anything that points to "wantonness."[11] In this context, as in the context of medical care or

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[10] *Compare generally* Prosser and Keeton on Torts, § 1 (5th ed. 1984).

[11] Albers, in footnote 10 of his brief, makes a passing argument that Whitley's cry "Shoot the bastards" as he began his pursuit of Klenk, could suffice to show some kind of evil intent. He does not press the argument, for good reason.

First, to the extent Albers predicates a constitutional violation on the overall strategy of the officials, Whitley's statement has no bearing either on the formulation or the execution of that strategy. All orders were followed

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psychiatric treatment, a complete failure to bring professional judgment to bear in responding to the riot would, we submit, equate with wantonness. *See Estelle v. Gamble*, 429 U.S. at 104-06 and n. 10; *cf. Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982). Facts suggesting that injuries were inflicted vindictively, purely for the sake of injuring, rather than to regain control of the cellblock, would evidence both wantonness and lack of justification. Albers has not claimed vindictiveness or retaliation, nor could he on this record. Furthermore, professional judgment unquestionably was brought to bear throughout the formulation of a plan to restore control and free the hostage, although others may in hindsight disagree with the decisions the officials made. There is no evidence of wantonness; indeed the only evidence on the point refutes the assertion that officials acted wantonly.

The best that can be said of Albers' case is that the responsible officials, in the exercise of their professional judgment, may have misjudged the risks, or may have been imprudent or unwise. Only in that sense can the actions be characterized as "excessive." The evidence at most established a jury question by tort standards. Under a correct Eighth Amendment standard there was nothing for the jury to decide.

2. The parties and our respective amici divide sharply in our identification of the legal standard to be applied. Underlying that disagreement, however, is a particu-

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exactly. To the extent Albers desires to have liability turn specifically on the use of force against him, only Kennicott's actions are relevant. Kennicott fired, consistent with previously given orders, because Albers pursued Whitley up the stairs toward the hostage cell.

Whitley's statement was not an "order" at all, despite Albers characterization of it as such. As Whitley testified, he yelled the statement at Klenk in an effort to scare him away from cell 201. The statement might have been relevant if the armed guards opened fire on everyone in response, contrary to previously given orders. But they did not.

larly fundamental dispute on the appropriate role of judges or juries in reviewing the judgments made and actions taken by the institution officials.

Despite Albers' persistent mischaracterization of our argument, we do not advocate a "riot exception" to the Eighth Amendment that would insulate prison officials from any judicial scrutiny. Judicial scrutiny clearly is appropriate. But the question of the proper scope of that scrutiny is important to ask and to resolve correctly.

Albers and his amici argue that the constitutional standard focuses on reasonably necessary force and exhaustion of milder alternatives. Even if they are correct, the question is still begged. Their argument does not address by what standard courts are to review the judgment of prison officials. This case squarely underscores the problem. There is no question that the responsible administrators held themselves to precisely the standard that Albers and his amici advocate. They based their decisions on the dangers as they perceived them; they attempted to determine what measures were reasonably needed; they considered and in some respects exhausted milder alternatives; they used force only where, in their judgment, the safety of others would have been unduly jeopardized had they not used force. The question never directly confronted by Albers or his amici is: Should judges or juries review the circumstances anew, determine for themselves what "reasonably" should have been done, and find liability if their opinion differs from that of the officials? Albers' answer is that they should. We adamantly disagree.

Albers essentially asserts that where reasonable minds can differ on the evidence, resolution of that difference is a "classic jury issue." (Resp. Br. at 25). But that is a tort standard, not one that flows from the Eighth Amendment. Eighth Amendment questions traditionally have been

legal inquiries for judges. Classically, under the Eighth Amendment, if reasonable minds can differ, they are entitled to differ, and challenged action must be upheld. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. ___, 104 S.Ct. 3154, 3165 (1984) (the Eighth Amendment is not violated every time a state holds a minority view on how best to administer its laws). The existence of a remedy for damages under section 1983 does not alter that result. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. ___, 105 S.Ct. 2427, 2432 (1985) (42 U.S.C. § 1983 creates no substantive rights; it merely provides a remedy for deprivations of rights established elsewhere).

Albers also points to this Court's recognition in *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) that juries perform an important function in criminal cases by maintaining a link between contemporary community values and the penal system. To argue from this that juries, on a case-by-case basis, should decide all assertions of cruel and unusual punishment seriously distorts the point made in *Gregg*. The Court recognized only that, viewed collectively, jury verdicts in criminal cases provide some indicia of society's contemporary sensitivities. Certainly *Gregg* does not support the argument that discrete twelve-person juries so accurately reflect contemporary values that we should leave it to them to decide the constitutionality of a sentence imposed in a given case.[12] Such *ad hoc* demarcation of constitutional boundaries by lay persons is unsupported by any precedent.

Although Albers fails to discuss it, *Youngberg v. Romeo*, 457 U.S. 307 (1982) is particularly apposite. That case involved the due process liberty interests of persons involuntarily committed to mental institutions. This Court held that individuals so committed were entitled to "reasonable" conditions of safety and freedom from "unreasonable" restraints. *Id.* at 321-24. The decision underscores the dangers of allowing juries to second-guess institution officials in determining "reasonable" treatment. The Court was unwilling to leave that inquiry to the unguided discretion of a judge or jury because to do so would remove uniformity in protecting constitutional interests, *id.* at 321, restrict unnecessarily the exercise of professional judgment, *id.* at 322, interfere unduly with the operations of state institutions, *id.*, and inappropriately place the determination of "reasonable" treatment in the hands of judges and juries less qualified than professionals to make those judgments, *id.* at 323. The Court accordingly held that a jury, in reviewing a treatment decision, must give it presumptive validity if it was made by a qualified professional; liability can be imposed only if the decision so substantially departs from professional standards as to demonstrate that in fact it was not based on professional judgment. *Id.*

[12] Indeed, since *Gregg* this Court has held that a state is not constitutionally required to have a system in which the jury participates in the sentencing decision in capital cases. *Spaziano v. Florida*, 104 S.Ct. at 3164.

Although the context (mental institutions) and constitutional provision (Due Process Clause) are different, the concerns raised in *Youngberg* parallel in every way the concerns that have caused this Court to insist on limited judicial scrutiny of actions of prison officials challenged under the Eighth Amendment. Albers closes his eyes both to policy and precedent because, quite simply, he has no case if the jury cannot freely substitute its judgment for that of prison administrators.

C. Albers' independent due process claim is not properly before the Court and is incorrectly analyzed.

1. Albers urges that throughout the litigation below he raised an *independent* claim that the prison officials' use of force violated his due-process-protected liberty interests. He

therefore asks the Court to consider the application of the Due Process Clause apart from his Eighth Amendment claim.

Although Albers now independently analyzes the principles and precedent that might bear on a due process claim, he did not do so below. His allegations and arguments consistently joined his citations to the Eighth and Fourteenth Amendments in a way that suggested he merely recognized the Fourteenth Amendment Due Process Clause as incorporating the protections of the Eighth Amendment, thus making them applicable to the states.[13] The district court logically concluded that Albers was not asserting an independent due process claim. *Albers v. Whitley*, 546 F.Supp. 726, 732 n. 1 (D. Or. 1982).

In the Ninth Circuit, Albers merely reiterated the argument he made to the district court. (Appellant's Brief at 28-29). He did not argue that the district court erred in its conclusion; he did not assert that the Ninth Circuit should view his position differently. We expressly pointed out that he was not disputing the trial court's conclusion. (Appellee's Brief at 5 n. 2). We therefore did not brief the issue, and the Ninth Circuit panel did not consider it to be before them, *Albers v. Whitley*, 743 F.2d 1372, 1374 n. 1 (9th Cir. 1984). This Court accordingly should decline Albers' invitation to interject a new constitutional challenge into the dispute.

[13] Specifically, his trial memorandum stated:

> The constitutional prohibition against the use of excessive and unnecessary force joins together the Eighth Amendment's proscription of cruel and unusual punishment and the Fourteenth Amendment's principle of due process of law. *King v. Blankenship, supra*, at 72; *Beishir v. Swenson*, 331 F. Supp. 1227 (WD Mo 1971). The question is not solely whether corrections officials took action intended to be punishment in the traditional sense. Rather, when force is applied, even only as a response to a perceived danger, with the force exceeding what was necessary under the circumstances and causing substantial injury, the result reaches the dimension of cruel and unusual punishment and denies the injured person due process of law. *Id.*

Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at p. 4.

2. On its merits, Albers' argument must fail. For the limited purpose of our response to Albers' due process argument, we assume that the Due Process Clause extends independent substantive protections to lawfully incarcerated prisoners. Albers' analysis nevertheless completely misses the mark.

Nowhere in his due process discussion or elsewhere in his brief does Albers so much as cite *Bell v. Wolfish*, 441 U.S. 520 (1979) or *Block v. Rutherford*, 468 U.S. ___, 104 S.Ct. 3227 (1984). The omission is fatal: *Bell* and *Block* are concerned with due process protections for pretrial detainees, a context so analogous as to be nearly on point if a due process analysis is appropriate here. Those cases, however, squarely reject Albers' "balancing" approach. *E.g.*, *Block v. Rutherford*, 104 S.Ct. at 3234.

The superficiality of Albers' due process analysis is further highlighted by his failure to acknowledge the decision in *Youngberg v. Romeo*. In *Youngberg*, this Court expressly rejected the notion that a jury should be free to substitute its judgment for that of the officials on what constitutes "reasonable" treatment or restrictions in an institutional setting. Yet that would be precisely the consequence of the standard that Albers advocates.

The relevant due process test adopted by this Court deems a course of action chosen by a competent[14] professional to be presumptively valid. A professional's judgment will not be second-guessed by federal courts unless it is so far outside of

[14] Competence, in this context, refers to education, training or experience that qualifies the decision maker to make the particular decision at issue. *Youngberg*, 457 U.S. at 323 n. 30.

the range of professionally acceptable choices as to evidence either a failure to exercise professional judgment, *Youngberg v. Romeo*, 457 U.S. at 323, or an impermissible ulterior motive, *Bell v. Wolfish*, 441 U.S. at 539 and n. 20. If a complainant cannot demonstrate that the challenged action exceeds these limits, the court's inquiry must end. *Block v. Rutherford*, 104 S.Ct. at 3234.

This due process analysis fits comfortably with the Court's prior Eighth Amendment tests. The exercise of professional judgment in making a choice from a range of professionally acceptable responses is, by definition, neither deliberately indifferent nor wanton even if hindsight suggests a better choice. *Estelle v. Gamble*, 429 U.S. at 105-07. When, as in this case, it is uncontradicted that the administrators considered less drastic responses and rejected them for reasons which are not plainly frivolous, any suggestion of wantonness or deliberate indifference is refuted conclusively. A due process challenge to the use of force in this case, even if properly brought, would fail as surely as does Albers' Eighth Amendment claim.

II. ALBERS HAS FAILED TO PRESENT A CONVINCING ARGUMENT WHY DEFENDANT PRISON OFFICIALS SHOULD NOT BE IMMUNE FROM LIABILITY.

1. Albers asserts that the question presented in the petition for certiorari does not properly raise the issue of defendants' qualified immunity. His procedural objection is both ill-founded and untimely.

We carefully framed our question presented to encompass the dual legal issues raised, briefed, argued and decided at every level of the proceedings below. The question asks whether an Eighth Amendment violation is established by evidence satisfying the tort-like analysis announced by the Ninth Circuit, and also whether a violation found on the basis

of that standard would expose these officials to liability for damages. The language "so as to expose prison officials to liability for damages" is not mere surplusage. It fairly encompasses the qualified immunity issue extensively discussed in the petition for certiorari. Pursuant to Supreme Court Rule 21(1)(a), the statement of the question presented is "deemed to comprise every subsidiary question fairly included therein." Albers' argument accordingly is without merit.

Moreover, his protest at this late hour is not a fair or timely way to raise this point of procedure. The petition for certiorari fully developed our claim that the Ninth Circuit's ruling on the defense of qualified immunity was wrong and warranted review by this Court. In his brief in opposition to the petition, Albers did not assert that the qualified immunity issue was not fairly presented. The issue now has been fully briefed on the merits. If there is a procedural defect here, it should be deemed waived. *See City of Oklahoma City v. Tuttle*, 105 S.Ct. at 2432 (nonjurisdictional defects of this sort should be brought to the Court's attention *no later* than in the respondent's brief in opposition to the petition for certiorari).

2. In its resolution of the immunity issue, the Ninth Circuit Court of Appeals ignored the primary thrust of this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) by reinserting a subjective inquiry about petitioner's "good faith" into its immunity test.[15] Albers makes no attempt to defend the Ninth Circuit's decision, perhaps because the Ninth Circuit's approach is so obviously at odds with this Court's recent immunity case law. Albers instead attacks our immunity argument, but he does so by miscasting our posi-

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[15] In a recent en banc opinion, the Ninth Circuit cited its decision in this case for the proposition that an intentional deprivation of constitutional rights by state officials "can be excused when those officials, in the exercise of reasonable good faith, believe their action or inaction to be lawful." *Haygood v. Younger*, 769 F.2d 1350, 1358 (1985).

tion. Neither we nor the United States Solicitor General urges a standard for clear establishment of a constitutional right that requires factual identity. Our point is not that prison officials should be stripped of qualified immunity only if prior, "on all fours" case law constitutionally prohibits a particular type of official action. Our point is that, consistent with *Harlow v. Fitzgerald*, prison officials are entitled to delineation of the constitutional bounds of their conduct before they can be held liable for money damages.

Even if Albers correctly maintains that he had a clearly established constitutional right to be free from the use of "unreasonable, excessive or unnecessary deadly force," (Resp. Br. 43), he incorrectly asserts that these "standards" provided guidance to prison officials for application in this context. Indeed, a substantial part of Anglo-American law historically has been devoted to discerning the contemporary understanding of what is "reasonable" and "necessary." Even when "reasonableness" is the clearly established constitutional standard, refinement of that principle is a prerequisite to a deprivation of qualified immunity. For example, although the Fourth Amendment unquestionably prohibits "unreasonable searches," this Court recently recognized that the concept of an "unreasonable" search was not so self-evident that the Attorney General was required to predict that national security wiretaps would be found unreasonable. *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806 (1985). In upholding the Attorney General's claim of qualified immunity, the Court perceived that when the constitutional limits of official action have yet to be set in a concrete standard (*e.g.*, no national security wiretaps without a warrant) the establishment of an imprecise constitutional standard (*e.g.*, no unreasonable searches) would not defeat a qualified immunity claim. A prior instructive application of

the imprecise standard in a similar factual setting was required. *See also Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984).

Respondent is blind to this point, and the Ninth Circuit either ignored or resisted it. The legal standard and precedents Albers relies upon are inadequate because they failed to give prison officials any guidance about the level of force that would be deemed "reasonable" in legitimately comparable circumstances. The district court judge and the Ninth Circuit dissenter grasped this point, and correctly concluded that defendant prison officials were immune from damages liability.

CONCLUSION

The decision of the Ninth Circuit should be reversed. The case should be remanded with instructions to reinstate judgment for petitioners that was issued by the district court.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
Counsel for Petitioners

No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, ET AL., PETITIONERS

v.

GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether petitioners, state prison officials sued in their individual capacities, may be held liable under 42 U.S.C. 1983 on the theory that they subjected respondent, a prison inmate, to cruel and unusual punishment because respondent was injured in the course of petitioners' efforts to quell a prison riot.

2. Whether petitioners are entitled to qualified immunity from damages liability under the standard established in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

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INTEREST OF THE UNITED STATES

This case concerns the liability under 42 U.S.C 1983 of individual state prison officials as a result of their actions in quelling a prison riot. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials may be held liable in many of the same circumstances in which state officials are liable under Section 1983. Since this Court's decision will affect the extent to which federal prison officials may be held personally liable for acts committed in the course of their official duties, the United States has a clear interest in this case.

STATEMENT

1. On June 27, 1980, respondent was an inmate in Cellblock A of the Oregon State Penitentiary.[1] That evening, some inmates in Cellblock A became upset by what they believed to be the mistreatment of inmates who were being taken to the penitentiary's segregation and isolation building. Apparently because of the inmates' agitation, the corrections officers on duty in Cellblock A ordered the inmates to return to their cells. The inmates normally would have been permitted to remain outside their cells for three more hours. One inmate, Richard Klenk, was particularly upset by the order to return to his cell. He assaulted one of the two corrections officers on duty and that officer left the cellblock. Several inmates then began to destroy furniture and construct a barricade to block access into the cellblock. Officer Walker Fitts, who remained in Cellblock A, was moved to an office within the cellblock and kept under the control of the inmates. Pet. App. 2, 17-18; Tr. 53, 55-56, 100-108, 489.

The prison authorities were immediately notified of the incident. Petitioner Harol Whitley, the prison security manager, climbed over the furniture barricade and entered Cellblock A (Pet. App. 2, 18; Tr. 56). He spoke to inmate Klenk in an effort to end the disturbance; Klenk responded by threatening to kill Officer Fitts (Tr. 369-370). Whitley then arranged for several inmates to go to the segregation and isolation building to ascertain the condition of the inmates who had been observed earlier in the

[1] Cellblock A housed inmates with good disciplinary records. These inmates received privileges that were not accorded other prisoners, such as the right to spend more time outside their cells. Pet. App. 17; Tr. 55.

evening. They found that the inmates taken to isolation had been intoxicated. Whitley returned to Cellblock A and was permitted to speak to Officer Fitts, who appeared unharmed. Pet. App. 2-3, 18-19; Tr. 56-57, 370-372. At some point, inmate Klenk told Whitley that one inmate had been killed and that others would die (Pet. App. 3; Tr. 372). Whitley also became aware that Klenk had a homemade knife (Pet. App. 3, 19; Tr. 57).

Whitley later reentered the cellblock a third time to check on the condition of Officer Fitts after Fitts had been moved to a new location (Pet. App. 3, 19; Tr. 57). Respondent asked Whitley for the key to the cells housing elderly inmates so that these inmates could move to a safer location away from the disturbance. Whitley agreed to return with the key. Pet. App. 3, 19-20; Tr. 115-116.

Whitley left Cellblock A and conferred with petitioner Hoyt C. Cupp, the superintendent of the penitentiary, and petitioner J.C. Keeney, the assistant superintendent. They agreed that tear gas could not be used to quell the riot because the gas might not act quickly enough, could be ineffective because of the large area controlled by the inmates, and would cause discomfort to the inmates who had obeyed the order to return to their cells. The officials decided that the only feasible alternative was to enter the cellblock using armed force. Cupp ordered the squad to "shoot low." Pet. App. 3, 19; Tr. 372-375, 467-468, 511-512.

Respondent was waiting for Whitley when Whitley entered with the armed officers. Whitley ran up the cellblock stairs in pursuit of inmate Klenk, who had run toward the cell in which Officer Fitts was being held. Respondent began to run up the stairs after

Whitley and was hit in the knee by a shot discharged by petitioner Robert Kennicott, a corrections officer. Pet. App. 3-4, 20-21; Tr. 58, 118-119, 375-376. Kennicott testified that he believed that the inmates pursuing Whitley presented a danger both to Whitley and to Officer Fitts (Tr. 459; see also Tr. 375). Whitley subdued Klenk, and respondent was given medical care. Respondent suffered permanent damage to the nerve in his leg. Pet. App. 4, 21-22; Tr. 59, 67, 376.

2. Respondent commenced this action in the United States District Court for the District of Oregon seeking damages under 42 U.S.C. 1983. He asserted that petitioners' actions in quelling the riot subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

At the conclusion of the jury trial, the district court granted petitioners' motion for a directed verdict (Pet. App. 15-40). The court stated that in determining whether the officials' conduct amounted to cruel and unusual punishment, it was required to "examine such factors as the need for application of force, the relationship between the need and amount of force that was used, and the extent of the injury inflicted" (*id.* at 25). Observing that "[p]rison officials must be free to deal firmly with outbreaks and uncontrolled situations" (*id.* at 26), the court concluded that the use of force to quell the riot in this case was justified because negotiations had failed to restore order, a guard was being held hostage, and a leader of the riot had "claimed to have killed one inmate and threatened others" (*id.* at 27). The court also found that the level of force used by petitioners was reasonable (*id.* at 30):

> Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that [petitioners'] actions were not reasonably necessary.

The district court also held that petitioners were entitled to qualified immunity from damages. Applying the test set forth in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the court found that petitioners could not have reasonably known that their actions to suppress the disturbance and rescue the hostage would violate any prisoner's Eighth Amendment rights. It noted that no reported case had held that a prisoner could recover damages for prison officials' actions in this context and that the applicable decisions "provided great discretion to prison officials to take necessary action to maintain and control prison situations" (Pet. App. 35).[2]

3. The court of appeals reversed by a divided vote (Pet. App. 1-14). The court held that there was sufficient evidence from which a jury could have found that respondent's constitutional rights had been violated. It stated (*id.* at 6-7 (citation omitted)):

> [A] proper standard deems [the] eighth amendment to have been violated when the force used

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[2] The district court stated that it "[did] not understand [respondent] to assert an independent violation of fourteenth amendment due process" (Pet. App. 23 n.1). The court also held (*id.* at 35-39) that respondent's state law tort claims were barred because petitioners were immune from liability under state law.

> is "so unreasonable or excessive to be clearly disproportionate to the need reasonably perceived by prison officials at the time." Thus if a prison official deliberately shot [respondent] under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary, [respondent's] constitutional right would have been infringed.

The court observed that there was evidence that the riot was subsiding at the time petitioners acted and that "[t]he jury might have believed that conditions were so improved that it was or should have been apparent to [petitioners], and have called for less force" (*id.* at 8). The court noted that each side had presented testimony concerning the propriety of petitioners' actions and "[i]t was the jury's function to weigh the experts' testimony" (*id.* at 9). The court therefore remanded for a new trial (*id.* at 9-10).

The court of appeals also addressed petitioners' qualified immunity defense. It stated that a finding of a violation of an inmate's Eighth Amendment rights is "inconsistent with a finding of good faith or qualified immunity. The two findings are mutually exclusive" (Pet. App. 10). Thus, "[i]f an eighth amendment violation is found, there is no qualified immunity defense available" (*id.* at 11).[3]

Judge Wright dissented (Pet. App. 11-14). He agreed with the district court that "no triable issue existed because the prison officials responded in good faith to a genuine emergency," stating that "[c]lose judicial scrutiny is inappropriate where prison officials react in good faith to a true crisis" (*id.* at 12). With respect to the qualified immunity issue, Judge

[3] The court of appeals affirmed the district court's dismissal of respondent's state law tort claims (Pet. App. 11).

Wright observed that the majority had "merge[d]" the question whether there was a violation of Eighth Amendment rights with "the question whether a right is 'clearly established' for qualified immunity purposes" (*id.* at 13). He concluded that these constitutional rights were not clearly established, noting (*ibid.*) that "[n]o court has awarded damages to a prisoner injured in a prison riot. As evidenced by the divergence of opinion among us on this panel, the constitutional rights of prisoners during a prison riot are not well settled."

SUMMARY OF ARGUMENT

A. Prison officials are charged with the "monumental task[]" (*Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 9) of maintaining the safety and security of institutions housing proven lawbreakers, in which violence is an unavoidable fact of life. In the incident at issue here, for example, inmates took control of a cellblock, assaulted one guard, and held another guard hostage and threatened his life. Petitioners were required to use force to rescue the hostage and reestablish control over the cellblock.

The question in this case is whether petitioners' actions violated respondent's constitutional rights. This Court consistently has adhered to the view that prison officials' determinations regarding prison security are entitled to "wide-ranging deference," both because of these officials' expertise and because the operation of prisons is a matter within the province of the executive and legislative branches. Such deference is especially appropriate when security decisions are evaluated under the Eighth Amendment because the Amendment only establishes a minimum

standard for prison officials' actions, barring the "'unnecessary and wanton infliction of pain.'" *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976).

A prison security measure that is a reasonable response to security concerns does not constitute "punishment" under the Due Process Clause (*Bell* v. *Wolfish*, 441 U.S. 520, 539-540 (1979)), and therefore cannot violate the Eighth Amendment's prohibition against cruel and unusual punishment. Moreover, even a security measure that is unreasonable may not result in the "unnecessary and wanton infliction of pain"; the Eighth Amendment is violated only if the measure does inflict pain upon an inmate and is so grossly excessive in view of the security concerns it is designed to address that it can fairly be said to have a punitive component unrelated to the maintenance of security.

The court below plainly erred by holding that respondent had raised a jury question concerning the propriety of petitioners' conduct under the Eighth Amendment. In view of the serious threat that the riot posed to the safety of both corrections officers and inmates, the district court correctly concluded that petitioners' use of force to quell the riot did not constitute cruel and unusual punishment. Respondent's evidence at most created an issue as to whether petitioners made the best possible decisions under the circumstances; it did not show that petitioners' actions were grossly excessive or amounted to the wanton infliction of pain.

B. Even if petitioners' actions did violate respondent's Eighth Amendment rights, petitioners are immune from liability for damages. This Court held in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that monetary liability is appropriate only if a public

official violates a constitutional right that was "clearly established" at the time of his unlawful conduct. Since no decisions had addressed the propriety under the Eighth Amendment of the use of force to quell a prison riot, respondent's rights in this context obviously were not clearly established.

The court of appeals' rejection of petitioners' immunity defense apparently rested on its view that an official is not entitled to immunity if the relevant general legal standard is clearly established at the time of the challenged conduct. This rule ignores the fact that it often is not at all clear how a general standard applies to the particular situation in which the official is required to act. Here, for example, standards such as "cruel and unusual punishment" or "deliberate indifference" to inmates' rights provide no guidance concerning the application of the Eighth Amendment to petitioners' conduct. Thus, the court of appeals' approach is fundamentally at odds with this Court's repeated statements that an official is entitled to immunity unless he reasonably could have known that his conduct was unlawful. Since petitioners had no basis even to question the constitutionality of their actions, they are entitled to immunity from liability for damages.

ARGUMENT

RESPONDENT CANNOT RECOVER DAMAGES UNDER 42 U.S.C. 1983 FOR PETITIONERS' CONDUCT IN QUELLING A PRISON RIOT

The parties and the courts below have characterized the question in this case as whether petitioners' conduct in quelling the prison riot violated the Eighth Amendment's prohibition of "cruel and unusual punishments."[4] As a threshold matter, we are not certain that petitioners' action should be evaluated under the Eighth Amendment.

There is no evidence that petitioners intended to inflict "punishment" on respondent or any other inmate. Respondent argues only that, in restoring prison security, petitioners used force that was excessive under the circumstances. In addition, respondent's claim does not rest upon the breach by prison officials of an affirmative obligation arising solely as a result of respondent's incarceration, such as the obligations to provide sanitary living conditions and access to medical care discussed in this Court's previous Eighth Amendment cases. See *Rhodes* v. *Chapman*, 452 U.S. 337, 347-348 (1981); *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976). The right relied upon by respondent in this case is not unique to persons who are incarcerated after being convicted of a criminal offense; all persons are protected by the Constitution against the use of excessive force by law enforcement officers. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787 (1966); *Screws* v. *United States*, 325 U.S. 91 (1945). The conduct

[4] This Court has held that the Eighth Amendment is made applicable to the states by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

challenged by respondent similarly is not by its nature restricted to the prison setting; law enforcement officers are confronted with riots and hostage-takings on urban streets and in office buildings.

These factors suggest to us that the Eighth Amendment may not govern the conduct at issue in this case. Cf. *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). The constitutionality of petitioners' actions might more properly be measured by the standard that applies to law enforcement officers' conduct generally: whether petitioners violated respondent's due process rights because they used excessive force in responding to the threat to prison security and safety posed by the riot. 481 F.2d at 1033; see also *Norris* v. *District of Columbia*, 737 F.2d 1148, 1150-1152 (D.C. Cir. 1984); *United States* v. *Harrison*, 671 F.2d 1159, 1161-1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); *Putman* v. *Gerloff*, 639 F.2d 415, 420-421 (8th Cir. 1981).[5] In view of the approach taken by the parties and the courts below, however, we have framed our argument in Eighth Amendment terms.

A. Respondent Was Not Subjected To Cruel And Unusual Punishment By Petitioners' Actions In Suppressing The Prison Riot

1. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct" (*Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 8). There is an "ever-present potential for violent confrontation and conflagration" (*Jones* v. *North Carolina Prisoners' Labor Union*,

[5] Petitioners' actions plainly did not violate this standard (see pages 22-24, *infra*).

Inc., 433 U.S. 119, 132 (1977)). The close quarters in which inmates live and work and the constant supervision of inmates by corrections officers combine to create a volatile atmosphere of tension, frustration, resentment, and despair. The violent conduct by inmates that all too often results—directed against prison officials as well as fellow inmates—is an unfortunate, but unavoidable, fact of life in our Nation's prisons. See *Hudson* v. *Palmer*, slip op. 8; *Wolff* v. *McDonnell*, 418 U.S. 539, 562 (1974).[6]

Prison administrators are charged with the "monumental task[]" (*Hudson* v. *Palmer*, slip op. 9) of protecting the security of the institution and the safety of guards and other prison officials, inmates, and visitors in the face of these difficult conditions. As this Court has emphasized, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974); see also *Bell* v. *Wolfish*, 441 U.S. 520, 546-547 (1979). Thus, the issue presented here—the limits imposed by the Eighth Amendment upon prison officials' actions to protect safety and security in correctional institutions—is of overriding practical importance to prison administration.

2. This Court has made clear that the Eighth Amendment's prohibition of cruel and unusual punishment "proscribes more than physically barbarous punishments" (*Estelle* v. *Gamble*, 429 U.S. at 102). Penal measures that involve the " 'unnecessary and wanton infliction of pain' " have been found to violate the Eighth Amendment. *Id.* at 103, quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). For example, deliberate indifference to the medical needs of prison inmates constitutes cruel and unusual punishment because it can be the equivalent of physical torture or result in "pain and suffering which no one suggests would serve any penological purpose" (*Gamble*, 429 U.S. at 103). Similarly, the conditions of prison inmates' confinement—their living and working environment and the punishment inflicted upon them for misconduct—may violate the Eighth Amendment if the conditions are such that they amount to cruel and unusual punishment. *Rhodes* v. *Chapman*, 452 U.S. at 346-347; *Hutto* v. *Finney*, 437 U.S. 678, 685 (1978).

On the other hand, the Eighth Amendment plainly does not bar prison officials from taking measures to protect the safety and security of correctional institutions, even if such actions result in the infliction of pain upon inmates. The Amendment reaches only punitive official action that is "unnecessary and wanton"; security measures further the "central" correctional goals of safety and security. This Court recently observed in the Fourth Amendment context that a prisoner has no legitimate expectation of privacy in his cell because "society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security" (*Hudson* v. *Palmer*, slip op. 10). Similarly, the Eighth Amendment does not bar

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[6] Recent statistics concerning prison violence confirm this Court's observations in *Hudson* (slip op. 8) regarding the seriousness of this problem. During 1983 and the first half of 1984 there were over 30 riots or similar disturbances in the Nation's prisons, over 150 killings of inmates by other prisoners, nine killings of prison personnel by inmates, and several thousand assaults by inmates upon prison personnel. See *Prison Violence*, 9 Corrections Compendium 1, 6-10 (April 1985).

prison officials from acting to protect the institution's security and safety.

This is not to say that any rule, practice, or act will pass constitutional muster—assuming that the Eighth Amendment supplies the relevant standard—simply because it is labeled a security measure. For example, the wholly unjustified infliction of severe injuries upon an inmate by a corrections officer might well amount to cruel and unusual punishment. See, *e.g.*, *Williams* v. *Mussomelli*, 722 F.2d 1130 (3d Cir. 1983); *King* v. *Blankenship*, 636 F.2d 70 (4th Cir. 1980); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 23-24 (2d Cir. 1971). The relevant factors are whether the challenged action was motivated by genuine security concerns and whether it was so wholly excessive in view of the concerns it was designed to address that it rose to the level of cruel and unusual punishment.

This is not the first context in which this Court has been called upon to delineate the proper scope of judicial oversight of prison security decisions. The Court previously has rejected challenges to prison security measures under the First Amendment, the Fourth Amendment, the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment, repeatedly affirming that "[p]rison administrators * * * should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" (*Bell* v. *Wolfish*, 441 U.S. at 547). This deference "is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548; see also *Hudson* v. *Palmer*, slip op. 9-10; *Block* v. *Rutherford*, No. 83-317 (July 3, 1984), slip op. 8-9; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 126, 128; *Pell* v. *Procunier*, 417 U.S. at 826-827.

In *Bell* v. *Wolfish*, *supra*, the Court addressed a challenge under the Fifth Amendment to several rules and practices designed to promote the security of a correctional institution housing pretrial detainees.[7] The Court observed that the Fifth Amendment, rather than the Eighth Amendment, supplied the relevant constitutional standard because "a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law" (441 U.S. at 535 (footnote omitted)). It held that "[r]estraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment" (*id.* at 540) and therefore do not violate due process. If, on the other hand, the restraints are "arbitrary or purposeless," they cannot be justified as security measures and amount instead to impermissible punishment (*id.* at 539).

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[7] At issue in *Bell* were (1) a rule permitting inmates to receive hardback books only if the books were mailed directly from a publisher, bookstore, or book club; (2) a rule barring inmates from receiving packages containing food or personal property except for one package of food at Christmas; (3) the practice of conducting unannounced searches of inmate living areas; and (4) a rule requiring inmates to expose their body cavities for inspection in the course of a strip search following a contact visit with a person from outside the institution. See 441 U.S. at 548-560.

Under the standard set forth in *Bell*, the party challenging a prison security measure bears the "heavy burden of showing that [prison] officials have exaggerated their response to the genuine security considerations that actuated [the challenged] restrictions and practices" (441 U.S. at 561-562), taking into account the "wide-ranging" deference accorded to prison officials' determinations in this area (*id.* at 562, 540-541 n.23). The Court in *Bell* held that this standard had not been met and upheld the challenged security measures.

Recently, in *Block* v. *Rutherford*, *supra*, the Court again rejected a due process challenge to security measures applicable to pretrial detainees. The district court in that case declared unconstitutional the prison's policy barring contact visits between inmates and their relatives and friends, holding that the policy was an excessive response to security concerns. This Court rejected that conclusion. It found that the relevant inquiry was whether the policy was "reasonably related to the security of [the] facility" (slip op. 10). Observing that the district court had recognized that many security considerations weighed in favor of the prison's policy, this Court held that "[w]hen the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of [the prison] for that of the experienced administrators of that facility" (*id.* at 12-13).[8]

[8] This Court discussed the application of this type of reasonableness standard in a somewhat related context in *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). *Youngberg* concerned the constitutional rights of mentally retarded persons involuntarily committed to state facilities. The Court held that the conditions under which such persons are confined—their freedom of movement, their safety within the institution, and the training provided by the state—must satisfy a reasonableness standard: " 'the courts [are required to] make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made' " (*id.* at 321). Relying in part upon its prior decisions in the prison context (*id.* at 322 n.29), this Court stated that "courts must show deference to the judgment exercised by a qualified professional" (*id.* at 322). It concluded that "the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment" (*id.* at 323 (footnotes omitted)).

In our view, the test applied in *Bell* and *Block* provides an appropriate starting point for assessing a security measure under the Eighth Amendment.[9] The administration of a prison is "at best an extraordinarily difficult undertaking" (*Wolff* v. *McDonnell*, 418 U.S. at 566), and, as discussed above (see pages 11-12 and note 6, *supra*), where security and safety are concerned the task facing prison officials is

[9] The ultimate inquiry in *Bell* and *Block*—whether a particular condition of confinement constitutes "punishment" and is, simply by virtue of that fact, prohibited—is not relevant in this context because, unlike pretrial detainees, convicted inmates such as respondent can be punished. Indeed, the determination that the Eighth Amendment supplies the standard applicable to petitioners' actions carries with it the conclusion that security measures of the sort at issue here are an element of punishment analogous to the size and sanitary condition of an inmate's cell (see pages 10-11, *supra*). The question is whether a security measure violates the Eighth Amendment because it is "cruel and unusual."

"monumental" (*Hudson* v. *Palmer*, slip op. 9). The deference accorded to prison administrators' security decisions in other contexts is just as appropriate when such decisions are reviewed under the Eighth Amendment. See *Rhodes* v. *Chapman*, 452 U.S. at 349 n.14 ("a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators").[10]

Furthermore, even if a security measure fails to satisfy this standard because it is not reasonably related to the need to maintain order, the measure does not necessarily constitute *cruel and unusual* punishment. Cruel and unusual punishment is the "'unnecessary and wanton infliction of pain.'" *Gamble*, 429 U.S. at 103; see also *Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977). The challenged conduct thus must result in pain analogous to that caused by physical torture or indifference to inmates' serious medical needs. Cf. *Gamble*, 429 U.S. at 103-104.

The official action also must be "wanton." In other words, the action must depart from the bounds of reasonable conduct to a degree that fairly indicates the presence of a punitive component unrelated to

[10] The present case differs from *Bell* and *Block* in that what is challenged here is a decision by prison officials to take emergency action in response to a specific threat to prison security; this Court's previous decisions addressed security policies of general application. The emergency nature of the situation obviously is relevant in determining whether the officials acted reasonably. Even the court of appeals acknowledged that "[prison] authorities must be allowed a reasonable latitude for the exercise of discretion in determining the appropriate response to a crisis." Pet. App. 6; see also *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). Thus, in determining whether a particular security measure is reasonable, a court must give due consideration to any exigent circumstances facing the prison officials.

the maintenance of prison security.[11] Just as prison medical care violates the Eighth Amendment only if it is so grossly improper that it evidences deliberate indifference to the inmate's serious medical needs, a prison security measure is unconstitutional only if it is a grossly excessive response to legitimate security concerns.[12]

3. a. Although the court below used terms such as "disproportionate" and "excessive" to describe the relevant legal standard (Pet. App. 6), it did not apply those concepts to the facts of this case. The court instead adopted a rule that tightly restricts the discretion of prison officials. It stated that an

[11] The Eighth Amendment establishes a lower limit upon the permissible range of prison officials' conduct; it does not set particular standards amounting to a model code of prison administration. Cf. *Rhodes* v. *Chapman*, 452 U.S. at 347, 348-349 n.13. Specific standards for the operation of prisons are supplied by the statutory and regulatory rules that govern the actions of prison officials. For example, at the time of the events at issue in this case the State of Oregon had an established policy concerning the use of force to maintain security and safety in correctional institutions (see Tr. 236-237).

[12] The courts of appeals generally have followed a similar approach in evaluating claims that prison security measures violated an inmate's Eighth Amendment rights. For example, in *Williams* v. *Mussomelli*, *supra*, the court of appeals approved a jury instruction stating that the inmate had a right "not to be subjected to unnecessary, unreasonable, and grossly excessive force by prison officials" and that such officials could not use force that "violates the standards of decency more or less universally accepted." 722 F.2d at 1132; see also *Soto* v. *Dickey*, 744 F.2d 1260 (7th Cir. 1984), cert. denied, No. 84-1327 (Mar. 25, 1985); *Jones* v. *Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), cert. denied, No. 83-6480 (June 4, 1984); *Sampley* v. *Ruettgers*, 704 F.2d 491, 495-496 (10th Cir. 1983); cf. *Johnson* v. *Glick*, 481 F.2d at 1033.

Eighth Amendment violation would be established if the prison officials "knew or should have known that it was unnecessary" to use armed force in order to quell the riot (Pet. App. 6-7).

The court of appeals appears to have based its rule upon the tort standard governing the use of force. Compare Restatement (Second) of Torts § 132 (1965) (use of force to effect an arrest "is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary"); see also *id.* § 70(1). This Court already has rejected the view that the Eighth Amendment constitutionalizes state tort law. In *Gamble*, the Court held that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 106; cf. *Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981); *Baker* v. *McCollan*, 443 U.S. 137, 142, 146 (1979).

Moreover, the court of appeals' rule provides for considerably more judicial intrusion into prison security decisions than the tests previously applied by this Court, and therefore violates this Court's repeated injunction that prison officials' decisions must be accorded broad deference (see pages 14-16, *supra*). Indeed, the standard resembles the "compelling necessity" test that this Court in *Bell* deemed overly restrictive of prison officials' discretion (see 441 U.S. at 531-540). Thus, the court of appeals failed to apply the correct legal standard in evaluating respondent's claim.

b. The court of appeals also stated that an Eighth Amendment violation could be established by a showing that the prison officials acted with "deliberate indifference" to respondent's right "to be free of cruel and unusual punishment" (Pet. App. 7). Acknowledging that this standard was developed by this Court in *Gamble* to identify situations in which the denial of medical care to inmates constitutes cruel and unusual punishment, the court of appeals found that the same standard "may appropriately be applied to test the constitutionality of other exercises of professional judgment by prison officials that result in harm to prisoners" (Pet. App. 7).

The court below erred by utilizing this standard in the present context. The deliberate indifference test was designed to measure claims that prison officials had not fulfilled their affirmative obligation to provide medical care to inmates (see *Estelle* v. *Gamble*, 429 U.S. at 103). In selecting an appropriate security measure, by contrast, prison officials take into account much more than a single affirmative obligation. They must balance a number of competing factors, such as the safety of guards, the safety of inmates, and the institutional interest in restoring order, and consider as well the adverse effect that a proposed security measure might have upon the interests of inmates, guards, and the institution itself. An allegation that prison officials were "deliberately indifferent" to one of these factors—the infliction of pain upon inmates—may be relevant to determining whether the security action was appropriate, but is not by itself sufficient to show that a prison official acted wantonly in carrying out his obligation to maintain the saf and security of the institution. That determination can only be made on the basis of an assessment of all of the relevant factors. Therefore, the deliberate indifference standard simply is not a

proper measure of the constitutionality of prison security actions.

c. Judged against the appropriate standard, it is clear that petitioners' actions did not violate the Eighth Amendment. Petitioners confronted a situation in which one guard had been assaulted, threats had been made against a guard who was being held hostage and against other inmates, one inmate was known to have a knife, an inmate reportedly had been killed, and attempts to negotiate an end to the disturbance had proven unsuccessful. These facts unquestionably justified some security response by petitioners, including the use of force; viewing the evidence in the light most favorable to respondent,[13] a jury could not reasonably find that petitioners' actions were grossly excessive or wanton.

It is undisputed that petitioners evaluated possible courses of action, reasonably determined that certain alternatives—such as the use of tear gas—were not appropriate in this situation because they might jeopardize the safety of the hostage, and concluded that the use of force was necessary to protect the hostage and the other inmates. Although it is unfortunate that respondent was injured, the officials understandably believed that he posed a threat to both the hostage and the rescue party. See Pet. App. 26-30 (district court opinion). The district court correctly concluded that "[e]ven in hindsight, it cannot be said that [petitioners'] actions were not reasonably necessary" (*id.* at 30).

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[13] In evaluating the propriety of a decision to grant a motion for a directed verdict, "all reasonably possible inferences [should be drawn in favor of] the party whose case is attacked." *Galloway* v. *United States*, 319 U.S. 372, 395 (1943); see generally 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524 (1971).

The court of appeals held that there was a jury question concerning the lawfulness of petitioners' conduct on the basis of respondent's contentions that the riot had begun to subside and that prison officials could have reasserted control by using a lesser amount of force (see Pet. App. 8-9). Respondent's expert witnesses testified that petitioners "were possibly a little hasty in using" armed force (Tr. 314) and that petitioners should have attempted to quell the riot using alternative methods short of the use of force (Tr. 266-270).

This Court has emphatically rejected precisely this type of second-guessing of prison administrators' decisions, and it should do so again here. As we have discussed, it is clear that petitioners acted reasonably in response to a crisis posing unquestionably grave security concerns; even respondent's experts, viewing the matter with two years' hindsight, did not testify that petitioners' actions were grossly excessive or clearly arbitrary.[14] In view of these facts, the court's "inquiry should have ended" (*Block* v. *Rutherford*, slip op. 13). The dispute over whether petitioners' actions constituted the ideal response under the circumstances is not sufficient to create an issue for the jury under the Eighth Amendment, especially in view of the fact that petitioners acted in the face of immediate threats to the lives of inmates and a cor-

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[14] Petitioners' expert witnesses testified that petitioners' actions were the most reasonable response to the situation. See Tr. 436-439, 547-554. In any event, it is the "public attitude" toward the challenged conduct, not the subjective views of experts, that is relevant in determining whether the conduct violates the Eighth Amendment. *Rhodes* v. *Chapman*, 452 U.S. at 348-349 n.13; *Gregg* v. *Georgia*, 428 U.S. at 173 (plurality opinion).

rections officer. Petitioners' actions clearly fell within "[t]he wide range of 'judgment calls' that * * * are confided to officials outside of the Judicial Branch of Government" (*Bell* v. *Wolfish*, 441 U.S. at 562). They plainly did not amount to the grossly excessive conduct that constitutes "unnecessary and wanton infliction of pain" violative of the Eighth Amendment.

B. Petitioners Are Immune From Liability For Damages Under This Court's Decision In *Harlow* v. *Fitzgerald*

It is settled that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18; *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 7. The court of appeals concluded that a finding on remand that petitioners violated respondent's Eighth Amendment rights automatically would defeat petitioners' qualified immunity defense. It stated that "[a] finding of deliberate indifference [to respondent's right to be free of cruel and unusual punishment] is inconsistent with a finding of good faith or qualified immunity." Pet. App. 10.

Even if the court of appeals correctly concluded that petitioners might have violated respondent's Eighth Amendment rights, it erred by holding that a state official is never entitled to immunity in an action based upon a violation of the Eighth Amendment. Indeed, the court's decision reflects a fundamental misconception of the rule established by this Court in *Harlow*.[15]

Harlow rests upon the principle that a public official should be held liable in damages only if he reasonably could have known that the law forbade his conduct. The official who acts unlawfully in such circumstances "should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action" (*Harlow*, 457 U.S. at 819 (footnote omitted)). If, on the other hand, "an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Ibid.* (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)).

Petitioners could not possibly have been aware in June 1980 that their actions violated respondent's Eighth Amendment rights. We have not located a single appellate decision discussing the circumstances in which the Eighth Amendment might be violated by the use of armed force to control a prison riot. Indeed, the decisions of that time concerning Eighth Amendment challenges to prison officials' actions in quelling disturbances indicated that officials had broad discretion in such circumstances to act to eliminate the threat to security and safety. *Poindexter* v. *Woodson*, 510 F.2d 464 (10th Cir.), cert. denied, 423 U.S. 846 (1975); *Clemmons* v. *Greggs*, 509 F.2d

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[15] This case does not present a question concerning the relationship between qualified immunity from liability for damages under 42 U.S.C. 1983 and criminal liability under 18 U.S.C. 242. Cf. *United States* v. *Gillock*, 445 U.S. 360, 372-373 (1980); *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976).

1338, 1339-1340 (5th Cir.), cert. denied, 423 U.S. 946 (1975); *Davis* v. *United States*, 439 F.2d 1118 (8th Cir. 1971); cf. *Spain* v. *Procunier*, 600 F.2d 189, 196 (9th Cir. 1979) (modifying district court order to reduce restrictions on use of tear gas).

Decisions finding violations of the Eighth Amendment in the prison context were restricted to claims of unjustified assaults upon inmates by prison guards. See, *e.g.*, *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d at 23-24. Thus, the district court correctly found that "there was no clearly established constitutional right to be free from the use of deadly force administered for the necessary purpose of quelling a prison riot and rescuing a hostage" (Pet. App. 34) and that petitioners therefore "could not have reasonably known that actions taken to quell the disturbance and rescue the hostage would violate any prisoner's constitutional rights" (*id.* at 35).[16]

The court of appeals did not question the district court's holding that the decided cases provided no

[16] A court should require especially strong evidence before holding that a right was clearly established if the right involves limitations upon official action in life-threatening emergency situations, such as the prison riot confronted by petitioners in this case. As this Court observed in an analogous context, "[w]hen a condition of civil disorder in fact exists, there is obvious need for prompt action" (*Scheuer* v. *Rhodes*, 416 U.S. 232, 246 (1974)). Moreover, "[d]ecisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy" (*id.* at 246-247). Since public officials who must act in such situations necessarily have less time to evaluate all of the implications of their chosen course of action, a right would have to be quite clearly established to inform a reasonable person that his action would be unlawful.

guidance concerning the application of the Eighth Amendment in this context. The court of appeals' conclusion that qualified immunity is never a defense to an Eighth Amendment claim appears to be based upon the view that all Eighth Amendment rights became clearly established when this Court adopted the "deliberate indifference" test in *Gamble*.[17] Even if the relevant legal standard is settled, however, the application of that standard in a particular factual setting often will be uncertain; the right in question cannot be deemed "clearly established" in that circumstance. For example, in *Davis* v. *Scherer*, *supra*, the question was whether state officials' failure to hold a hearing prior to the termination of the plaintiff's employment violated the plaintiff's clearly established due process rights. This Court observed that its previous decisions required " 'some kind of a hearing' " in this context, but concluded that the plaintiff's right to a pre-termination hearing was not clearly established because the Court had not yet "specif[ied] any minimally acceptable procedures for termination of employment" (*Davis* v. *Scherer*, slip op. 8 n.10). *Davis* makes clear that the existence of a general legal standard is irrelevant under *Harlow*; the unconstitutionality of the official's conduct in the particular situation at issue must be clearly estab-

[17] Alternatively, the court of appeals' statement that "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity" (Pet. App. 10) could mean that an official who acts with deliberate indifference necessarily does not act in subjective good faith, and therefore is not entitled to an immunity defense. The flaw in this reasoning is that it ignores this Court's determination in *Harlow* that an official's subjective intent is irrelevant in ascertaining whether he is entitled to immunity (457 U.S. at 815-819).

lished in order to defeat an immunity claim. Cf. *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 22-24 & n.23.

The premise of *Harlow* is that the imposition of monetary liability is appropriate when an official violates a clearly established right because the official "could be expected to know that [his] conduct would violate statutory or constitutional rights" (457 U.S. at 819). Broad standards such as "due process," "equal protection," or "cruel and unusual punishment" do not by themselves provide sufficient information to enable a reasonable public official to conform his conduct to the requirements of the Constitution. Therefore, the fact that a legal standard is settled cannot alone deprive an official of qualified immunity. *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, No. 84-1139 (Mar. 25, 1985) (stating that an interpretation of *Harlow* requiring only that the broadly-defined right be clearly established "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic") (emphasis in original); see also *Floyd* v. *Farrell*, 765 F.2d 1, 5-6 (1st Cir. 1985); *Zook* v. *Brown*, 748 F.2d 1161, 1164-1165 (7th Cir. 1984); *Evers* v. *County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984); *Bailey* v. *Turner*, 736 F.2d 963, 970, 972 (4th Cir. 1984); *Brockell* v. *Norton*, 732 F.2d 664 (8th Cir. 1984); *O'Hagan* v. *Soto*, 725 F.2d 878, 879 (2d Cir. 1984); but see *Bass* v. *Wallenstein*, No. 83-2392 (7th Cir. July 30, 1985), slip op. 22; *Bates* v. *Jean*, 745 F.2d 1146, 1151-1152 (7th Cir. 1984); *Trejo* v. *Perez*, 693 F.2d 482, 488 & n.10 (5th Cir. 1982).[18]

[18] In some cases in which courts of appeals have rejected an immunity claim on the ground that the legal standard was clearly established, immunity might have been barred under the proper legal test. See *Bates* v. *Jean*, *supra* (use of completely unwarranted force).

If the adoption of a legal standard such as "deliberate indifference" or "clearly excessive force" were by itself sufficient to deprive prison officials of qualified immunity in every case in which that standard applied, these officials would have no way of knowing in advance whether their decisions might later be the basis of a successful action for money damages. This result "would undoubtedly deter even the most conscientious [prison administrator] from exercising his judgment independently, forcefully, and in a manner best serving" the correctional system (*Wood* v. *Strickland*, 420 U.S. 308, 319-320 (1975)). It would "contribute not to principled and fearless decision-making but to intimidation" (*Pierson* v. *Ray*, 386 U.S. at 554)—the very result that qualified immunity is designed to prevent.

We do not contend that a right is clearly established only after the precise factual situation has been addressed authoritatively in judicial decisions. The proper inquiry is whether a reasonable person would have known that the challenged conduct was unlawful on the basis of the existing case law. As discussed above, petitioners are entitled to immunity because a reasonable prison official could not have known of the limits imposed by the Eighth Amendment upon the use of force to quell a prison riot.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

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No. 84-1077

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

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Petitioners,

v.

GERALD ALBERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CORRECTIONAL ASSOCIATION OF NEW YORK AND THE PENNSYLVANIA PRISON SOCIETY

Michael Mushlin
Counsel for *Amicus*
Correctional Association of N.Y.
c/o Pace University
School of Law
78 North Broadway
White Plains, N.Y. 10603

Steven Ney
Special Counsel for *Amicus*
Pennsylvania Prison Society
1616 P Street, N.W.
Washington, D.C. 20036

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QUESTION PRESENTED

Does the Eighth Amendment protect a prisoner from the unreasonable and excessive use of deadly force by prison officials?

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INTEREST OF AMICI

The Correctional Association of New York, founded in 1844, is a private non-profit civic organization vested with unique legislative authority to visit prisons and to report its findings and recommendations to the New York State Legislature. The Association which has been a close observer of the state of affairs in New York State's many jails and prisons, has in recent public reports commented on the role played by federal courts in shaping and guaranteeing compliance with professional correctional stand-

ards. We believe that liability under §1983 should not be eliminated in emergency situations such as occurred at Attica in 1971. It is in these situations, among all others, that inmates need the protection afforded by this important statute.

The Pennsylvania Prison Society is a private, non-profit membership organization founded in 1787 with the goal of improving prison conditions. In the intervening years the Society has been active in monitoring and urging improvements in Pennsylvania's criminal justice system, and now serves as an educational resource, informing professionals and the general community about existing conditions and practices in prisons, and related institutions, and advocating compliance with professional standards of conduct. We fear that creation of an emergency exception to liability under §1983 will eliminate an important deterrent force in protecting the safety of prisoners and ensuring compliance with those standards at the very moment when the need for such deterrence is greatest.

STATEMENT OF THE CASE

Gerald Albers was shot in the knee from behind by prison guards using shotguns to quell a prison disturbance in which he was not a participant. Albers, an honors prisoner, was housed in Cellblock "A" of the Oregon State Penitentiary. Cellblock "A" has two tiers, with one stairway between them. Albers was housed on the upper tier.

On the night of June 27, 1980, some inmates in cellblock "A" became agitated about what they viewed as mistreatment of other inmates. Administrators responded by issuing an early "cell in" order. One inmate, Klenk, who was particularly upset confronted two guards, assaulting one.

The assaulted guard was able to leave the area, while the other guard remained in the cellblock.

Several older inmates housed in medical cells became afraid that tear gas would be used in order to subdue Klenk. They asked Albers to see whether they could be moved before force was used. In an attempt to quiet the disturbance, Albers left his cell and asked Whitley, the Security Manager, if those in the lower cells could be moved in order to avoid the commotion. Whitley said that he would return with the key.

Instead Whitley returned a while later followed by three guards carrying shotguns. They had orders to shoot low, but to shoot anyone going up the stairs towards the cell where the guard was being held. Without verbal warning or admonition to prisoners to get out of the way Whitley yelled "shoot the bastards" and started up the stairs in pursuit of Klenk. When warning shots were fired Albers turned and ran back up the only stairway in order to return to his cell on the upper tier. As he ran he was shot in the back of the leg by officer Kennecott. A number of other prisoners were injured by the shooting, some in their cells. The officers met with no resistance, and had no trouble subduing Klenk.

Albers introduced expert witness testimony from former correctional officials that a verbal warning could and should have been given which might have avoided the injury to Albers. The experts testified that the use of deadly force against Albers under these circumstances was excessive and unreasonable. The defendants also presented expert testimony which for the most part disagreed with plaintiff's. One of defendants' experts, however, conceded that a verbal warning might have been appropriate if time allowed. After a three-day trial the district court directed a

verdict for the defendants and dismissed Albers' Eighth Amendment claim. The Court of Appeals reversed on this issue and remanded the case for a new trial.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported as *Albers v. Whitley,* 743 F.2d 1372 (9th Cir. 1984). The opinion of the District Court is reported as *Albers v. Whitley,* 546 F.Supp. 726 (D. Or. 1982).

SUMMARY OF ARGUMENT

This case presents the crucial issue of the extent to which the Eighth Amendment protects a prisoner from the excessive and unreasonable use of deadly force by prison officials. It is imperative that this standard be one that will restrain excessive and unreasonable behavior, even in an emergency, while still allowing officials sufficient freedom to act without undue fear of liability.

Several constitutional provisions may be implicated by this case. Under both the Eight and the Fourteenth Amendments, well-settled law requires that force used by prison officials must not be so unreasonable or excessive as to be clearly disproportionate to the need reasonably perceived by prison officials at the time. Since this case involves the use of deadly force, the interests that *Tennessee v. Garner,* 105 S.Ct. 1694 (1985), sought to protect may be implicated as well. The reasonableness standard imposed by that case requires that a prison guard have a reasonable basis for believing that an inmate presents a threat to himself or others, and that appropriate warnings should be issued before deadly force is used.

Either method of legal analysis is consistent with sound policies of modern prison management and with procedures currently followed by state departments of correction. Relevant professional standards, state statutory schemes and the policies and procedures followed by state corrections officials allow use of deadly force in a riot situation, but only as a last resort, and only after appropriate warnings have been given in order to minimize injury.

There was at least one issue in this case appropriately within the province of the jury: whether the shooting of Albers without a verbal warning under all the circumstances was clearly disproportionate to the need perceived at the time. Because this was a jury question, a directed verdict was inappropriate.

ARGUMENT

I. CLAIMS OF EXCESSIVE OR UNREASONABLE FORCE AGAINST PRISIONERS ARE APPROPRIATELY SUBJECT TO JUDICIAL REVIEW UNDER THE CONSTITUTION AND THE PRESENCE OF A "RIOT" SHOULD NOT WHOLLY ABROGATE CONSTITUTIONAL PROTECTION OR JUDICIAL SCRUTINY.

It is well-established under our Constitution that the use of force against prisoners must be justified by and have some reasonable relationship to legitimate correctional goals.[1] This principle has been stated in various ways

[1]This Court has never ruled directly on a prisoner's claim of excessive or unjustified force by prison employees. However, prior holdings imply most strongly that such a claim is actionable under the Constitution. In *Estelle v. Gamble,* 429 U.S. 97, 103 (1976) the Court based its holding that denial of medical care could constitute cruel and unusual punishment on the fact that, like physical abuse, it could result in unjustified pain or actual physical torture. In *Youngberg v.*

under different legal theories. The Court below held that cruel and unusual punishment clause of the Eighth Amendment was violated "when the force used is 'so unreasonable or excessive' to be clearly disproportionate to the need reasonably perceived at the time." 743 F.2d at

Romeo, 457 U.S. 305, 315 (1982) the Court noted that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the due process clause . . . [which] is not extinguished by lawful confinement even for penal purposes." *See also Hutto v. Finney,* 437 U.S. 678, 683 (1978) where the Court noted in connection with a lower court finding of Eighth Amendment violations that some "punishments for misconduct . . . were cruel, unusual and unpredictable" and in footnote references cited lashings with a leather strap, the use of electrical shock, shootings and beatings. *Id.* at notes 4, 5 and 6; and in *Ingraham v. Wright,* 430 U.S. 651 (1977), the Court observed in dictum, "prison brutality . . . is 'part of the total punishment to which the individual is being subjected for a crime, and, as such, is proper subject for Eighth Amendment scrutiny' ". *Id.* at 670 quoting *Ingraham v. Wright,* 525 F.2d 909, 915 (5th Cir. 1976).

The constitutional protection against gratuitous or excessive force is well-established in lower federal courts. *See e.g., Norris v. District of Columbia,* 737 F.2d 1148, 1150 (D.C. Cir. 1984) (that the use of force was both gratuitous and excessive is enough to withstand dismissal); *Lock v. Jenkins,* 641 F.2d 488, 495 (7th Cir. 1981) (prison officials violate due process making an unprovoked attack on a prisoner); *King v. Blankenship,* 636 F.2d 70, 73 (4th Cir. 1980) (beating and ripping beard from face of prisoner wholly unjustified under the circumstances); *Meredith v. State of Arizona, 523 F.2d 481 (9th Cir. 1975); Hamilton v. Chaffin,* 506 F.2d 901 (5th Cir. 1975) (use of excessive force constitutes a violation of the fourteenth amendment); *Curtis v. Everette,* 589 F.2d 516 (3rd Cir. 1973) (conduct which shocks the conscience violates the Fourteenth Amendment); *Howse v. DeBerry Correctional Institute,* 537 F.Supp. 1177, 1182 (M.D. Tenn. 1982). Without citation, the same standard was followed in the Eighth Circuit; *Jones v. Mabry,* 723 F.2d 590 (8th Cir. 1983). *See also, Ridley v. Leavitt,* 631 F.2d 358 (4th Cir. 1980) (if the threat of disorder or disobedience has subsided, only reasonable force under circumstances may lawfully be employed).

1375 quoting *Jones v. Mabry,* 723 F.2d 590, 596 (8th Cir. 1983).[2]

Judge Friendly of the Second Circuit in *Johnson v. Glick,* 481 F.2d 1028 (2nd Cir. 1973) *cert. den.* 414 U.S. 1033 (1973), preferred analyzing the claim of a "spontaneous attack by a guard" under the due process rationale of *Rochin v. California,* 342 U.S. 165, 172 (1952), prohibiting conduct that "shocks the conscience." Judge Friendly concluded that "application of undue force" by police officers or correctional officers violates the standard, and continued in now famous language

> . . . Not every push or shove, even it may later seem necessary in the peace of a judge's chambers, violates a prisoner's constitutional right. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Id.* at 1033.

Amici take no position on whether a due process

[2]The Court below also invoked the concept of "deliberate indifference" as a criterion for determining whether the use of deadiy force was justified. Borrowing this term from *Estelle v. Gamble,* supra, *amici* do not take this usage as significantly modifying or qualifying the language quoted from *Jones v. Mabry.* If prison officials use force that is "clearly disproportionate to the need reasonably perceived at the time" it is fair to conclude that they have acted with deliberate indifference; if the force they use is consistent with the need reasonably perceived a finding of deliberate indifference could not be justified.

analysis or an Eighth Amendment analysis is preferable.[3] It seems clear that under either amendment and either of the above quoted standards, the use of force against prisoners must be tailored to the needs of security, order or discipline as they were reasonably perceived by prison personnel at the time the force was applied. *Amici* believe that this principle is a salutory one and that this Court should adopt and enforce it. Moreover, *amici* believe that judicial review of claims of excessive force including trial by jury is appropriate and helpful in forcing and maintaining professional standards of prison management which uniformly condemn the gratuitious or excessive use of force.[4]

There is not and should not be a "riot" exception to this constitutional principle.[5] Experience shows that riots, disturbances and other prison emergencies are times when passions run high, anxiety is great, and the potential for serious unprofessional and ultimately counterproductive misconduct by prison personnel is correspondingly enhanced. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller,* 453 F.2d 12 (2nd Cir. 1971).

By the same token, a riot or disturbance may necessitate conduct which would clearly be inappropriate as part of routine prison management. Violent and disruptive inmates may have to be treated violently and peremptorily in order to safeguard life and restore order. However, acknowledging this reality does not require the Court to suspend all scrutiny of prison employees' acts and in effect, declare "open season." Rather, the governing legal standard should be flexible enough to accommodate the extreme exigencies of a prison disturbance as well as the more ordinary guard brutality claim. The standards asserted by the Ninth Circuit in this case and by Judge Friendly in *Johnson v. Glick,* both quoted *supra,* are quite suitable for this purpose since they allow ample room for consideration of the needs for force based on the needs of the particular situation confronting those charged with running the prison.

[3]Indeed Courts have used the same language under either a due process or an Eighth Amendment analysis. *Johnson v. Glick; Putman v. Gerloff,* 639 F.2d 415 (8th Cir. 1981); *King v. Blankenship,* 636 F.2d 70, 73 (4th Cir. 1980); *Furtado v. Bishop,* 604 F.2d 80, 95 (1st Cir. 1979); and *George v. Evans,* 633 F.2d 413 (5th Cir. 1980).

[4]Although the Court has never explicitly held that trial by jury is available under §1983, it has cited the availability and importance of jury trials in recognizing an Eighth Amendment damage claim against prison officials. *Carlson v. Green,* 442 U.S. 14, at 22-23 (1980). See also *Curtis v. Loether,* 415 U.S. 189 (1974) (jury trial available under fair housing provisions of Civil Rights Act of 1968). The lower federal courts are agreed that jury trials are available under §1983. *Dolence v. Flynn,* 628 F.2d 1280, 1282 (10th Cir. 1980) and cases cited therein.

[5]Insofar as Petitioners suggest that the usual standards of review of prison brutality claims do not apply to cases arising out of a "riot," Petitioners' Brief at 34-37, and 43-44, they ask the Court to create an exception when it has never passed on the underlying rule governing the use of force in prisons. Insofar as the Court finds it appropriate to explore the general standard for prison use of force, this case – involving as it does extreme behavior on the part both of the prison officials and some prisoners – may not be the appropriate factual vehicle for such an inquiry. After all, most prison brutality cases involve rather different allegations: e.g., physical retaliation against inmates who have personally offended guards or engaged in trivial misconduct, see *Johnson v. Glick,* supra; abusive over-reaction by prison employees against inmates who have committed more serious misconduct, see *King v. Blankenship, supra,* 636 F.2d 70 (4th Cir. 1980); *Martinez v. Rosado,* 614 F.2d 829, (2nd Cir. 1980); or use of force as a routine means of keeping order where the guard staff is inadequate. See *Hutto v. Finney,* 437 U.S. 678, 684 (1978); *Ruiz v. Estelle,* 503 F.Supp. 1265, 1299-1302 (S.D.Tex. 1980), *aff'd in part and rev'd in part on other grounds,* 679 F.2d 1115 (5th Cir. 1982).

For these reasons, the Court reasonably might conclude that certiorari was improvidently granted in this case.

II. LIMITS ON THE USE OF DEADLY FORCE, EVEN IN AN EMERGENCY, ARE CONSISTENT WITH PRINCIPLES OF SOUND PRISON MANAGEMENT.

This Court has properly been concerned that prison administration be left within the sound discretion of prison officials. *Rhodes v. Chapman,* 452 U.S. 337 (1981); *Procunier v. Martinez,* 416 U.S. 396 (1974); *Block v. Rutherford,* ____ U.S. ____, 104 U.S. S.Ct. 3227 (1984); *Hudson v. Palmer,* ____ U.S. ____, 104 S.Ct. 3194 (1984). Even in the best of circumstances prisons are difficult to manage and at times may be volatile and dangerous. Judges and juries therefore ordinarily are well-advised to defer to the judgment of prison officials and avoid intervening or second-guessing decisions of prison officials unless it is essential to safeguard constitutional rights.

The policy of deference to the judgment of correctional officials requires that this Court examine the policies and standards of the profession to ascertain how the profession views the use of deadly force in emergency situations. Such an examination reveals strong support for the view that where deadly force is involved prison officials must exercise restraint. The use of deadly force obviously carries with it the distinct possibility that values held in highest esteem by the Constitution – life and liberty – may be lost in the heat of the moment. It is essential that restraints apply in emergencies as well as in less emotionally charged times.

For this reason the corrections profession has developed standards and policies which apply whenever deadly force is used. Compliance with these standards is essential in order to limit the use of deadly force only to instances where it may accomplish the valid objectives of safeguarding lives of staff and inmates and preserving order

without unnecessarily compromising the safety of others, including non-participating inmates.

The tragic result of not practicing restraint was documented in the *Official Report of the New York State Special Commission on Attica* ("The McKay Commission Report") (Praeger, N.Y. 1972). In the Attica riot of 1971 forty three citizens were killed. Thirty-nine of these inmates and correctional officials died from gunfire used by state police and prison guards during retaking of the prison. The McKay Commission found that:

> . . . the conclusion is inescapable that there was much unnecessary shooting. Troopers shot into tents, trenches and barricades without looking first. In addition, even where the firing may have been justified – as in the case of a State Police lieutenant assaulted by an inmate in D yard – the use of shotguns loaded with buckshot in the heavily populated spaces of D yard led to the killing and wounding of hostages and inmates who were not engaged in any hostile activity. *Id.* at 335.

After making these findings the Commission made recommendations concerning future use of force in similar situations.

> The Commission believes that when the state commits an armed force against its own citizens, however provocative their conduct, *the state has a compelling moral obligation to ensure that such force is suitable for the mission; that it is controlled, restrained, and applied with precision against only the threats which justify its use.* Every aspect of such an operation must be considered, reasoned and deliberate, with the full realization that a failure to meet these obliga-

> tions can only result in the destruction of the very order the state seeks to preserve by its action. *Id.* at 348. (emphasis added)

The Commission specifically noted that protection of non-active participants must be taken into account when using deadly force.

> Precautions against killing or wounding such [non-active participants or those involved against their will] should have been an integral part of any assault plan. *Id.*

The McKay Commission Report also stressed the importance of verbal warnings to minimize injury and to minimize the amount of force used:

> When possible the use of deadly force shall be preceded by a clear warning to the individual or group that such force is contemplated or imminent.
>
> * * *
>
> The primary rule which governs the action of military forces in assisting state and local authorities to restore law and order is that the commander must, at all times, use only the minimum force required to accomplish the mission. . . . *Id.* at 364.[6]

If prison officials were allowed to use force with only minimal legal restraints the managers of correctional institutions would face far greater difficulty in assuring that their subordinates conformed their conduct to accepted professional standards.

[6]These recommendations from the Commission were taken from a plan developed by the New York State National Guard prior to the Attica riot. The existence of this plan, named Operation Skyhawk, "was forgotten at Attica . . . when the time came to reap the benefits of the professional foresight of Skyhawk's authors, their work-product lay in its folder in the files of the National Guard in Albany." *Id.* at 365.

Compliance with standards developed by the corrections profession will advance the dual goals of preserving institutional order and preventing prison guards from using excessive and unnecesary force in emergency situations.

III. THE EIGHTH AMENDMENT MUST BE INTERPRETED IN LIGHT OF EVOLVING STANDARDS OF DECENCY. THESE STANDARDS REQUIRE THAT WHEN PRISON OFFICIALS USE DEADLY FORCE IT IS USED ONLY AS A LAST RESORT, ONLY TO THE EXTENT NECESSARY TO ACHIEVE LEGITIMATE SECURITY GOALS, AND ONLY AFTER APPROPRIATE WARNINGS HAVE BEEN GIVEN.

A. Determination of Eighth Amendment standards of decency requires resort to objective criteria.

In dealing with conditions of confinement this Court has said that the Eighth Amendment prohibits punishments which although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (joint opinion). The Court has interpreted the words of the Eighth Amendment in a "flexible and dynamic manner" *Id.* at 171. Since the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86 (1958). In determining evolving standards of decency "a court's judgment should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman,* 452 U.S. at 345-346 *quoting Rummel v. Estelle,* 445 U.S. 263, 275 (1980).

Professional standards and model codes do not by themselves set constitutional minima. *Bell v. Wolfish,* 441 U.S. 520, 543 n. 27 (1979). Yet if the command of *Rhodes v. Chapman,* to interpret the Eighth Amendment in terms of objective criteria is to be applied, it must mean that courts and juries must heed the voices of state legislatures and state departments of correction in determining what is allowed by contemporary standards of decency. *Id.* at 347. When an aspect of punishment is universally discarded by state agencies which actually manage prison facilities it would be appropriate for a court or jury to conclude that the practice falls beneath the evolving standards of decency. To the degree that *amici* have been able to determine, the corrections profession as a whole rejects the use of corporal punishment, and will not permit the imposition of deadly force to any extent greater than that necessary to maintain order in the institution.

B. Contemporary standards of decency require that limitations on the use of deadly force apply in the prison context. The reasoning of the court in the *Garner* case is relevant.

Last term this Court determined the constitutional limitations placed upon the use of deadly force when a police officer arrests a fleeing felon. *Tennessee v. Garner,* 105 S.Ct. 1694 (1985).

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if where feasible, some warning has been given. *Id.* at 1701.

In arriving at the appropriate constitutional standard, the Court surveyed state statutes and departmental policies, and found that such limitations on the use of deadly force were reasonable. A similar look at state statutes, professional standards, and departmental policies indicates that a prisoner's right not to be subjected to unjustified use of deadly force is one that our society is willing to protect. Compare with *Hudson v. Palmer,* 104 S.Ct. at 3199 (where the court found that a prisoner has no protected privacy interest with respect ot the contents of his cell).

1. State Statutory Schemes Apply the Same Principles of Justification to Prison Guards as to Police Officers.

In *Garner,* this Court found that fewer than half of the states still allowed use of deadly force for the purpose of arresting a fleeing felon. *Id.* at 1701. *Amici* have conducted a similar review of state laws concerning the use of deadly force by prison officials. While not all state codes explicitly mention prison guards or wardens, to the extent that they do, they apply similar restrictions to both police officers and prison guards. It can fairly be said that such guards are generally not given more latitude in the use of force than police officers. As the American Bar Association commentary to its standard for the use of deadly force in the prison context points out:

> since corrections officers are not considered law enforcement officers in the full sense of the term

> as it applies to police and federal officers like FBI agents, *corrections officers certainly should be granted no broader license in the use of force than society is willing to grant its police.* American Bar Association, Standards for Criminal Justice, *Legal Status of Prisoners,* Commentary to Standard 23-6.13 Use of Force or Deadly Force (Fourth Tentative Draft 1980).[7] (emphasis added)

This policy is consistent with the approach taken in the Model Penal Code which has served as a pattern for many state laws. It explicitly holds prison guards accountable for use of force to the same degree as police officers.[8] The central portions of the Code dealing with use of deadly force by prison guards are the same provisions referred to in *Garner* dealing with the use of force by a police officer, and a continuation of that portion dealing with the use of deadly force to quell a riot. *Id.* §307.

Under the Model Penal Code deadly force may be used only if it does not present a threat to innocent persons, and the person against whom deadly force is used presents a threat of serious harm to the officer or others if his apprehension is delayed. Model Penal Code, §307 (b)(iii). During a riot deadly force may be used only after orders have been given to desist, and appropriate warnings have been given. *Id.* at §307 (5)(a)(ii)(2).

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[7]These standards and commentary were approved by the House of Delegates on February 9, 1981. When republished in final form the standards were renumbered. The "Use of Force and Deadly Force" Standard appears as 23-6.12.

[8]The Code allows prison guards to use such force as is necessary to maintain order but only such deadly force as is justifiable elsewhere under the Code. American Law Institute, *Model Penal Code, Section 308 Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others.* (Proposed Official Draft 1962).

Amici have conducted a survey which indicates that at least 35 states have placed a reasonableness or necessity limit upon the use of deadly force by prison officials. This suggests that it would be appropriate to place the same constitutional limitations on the use of deadly force by prison guards as is placed on police officers.

Twenty-two states have adopted a general principle of justification which requires that prison guards use only such physical force as is reasonable or necessary under the circumstances to maintain order and discipline.[9] In only one of these jurisdictions is a guard or warden allowed to use unlimited force in order to maintain discipline.[10] Four of these states have statutes that deal with escapes, but do not address the use of force in other contexts.[11] But fully seventeen of these twenty-two states have statutes which allow a warden to use only such force as is reasonable or

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[9]Ala. Code §13 A-3-24, 27 (1982); Alaska Stat. Ann. §11.81.370, 410 (1983); Ariz. Rev. Stat. Ann. §13-403(2), 410 (1978); Ark. Stat. Ann. §41-505 (1977); Colo. Rev. Stat. §18-1-703 (1978); Conn.Gen.Stat. §53 a-18(2) (1972); Del.Code Ann., Tit. 11 §467, 468 (1979); Fla. Stat. §944.34 (1983); Haw.Rev.Stat. §703-307, 309(5); Ill.Rev.Stat., Ch. 38 §§7-8, 1003-6-4 (1984); Ky. Rev. Stat. §503.090 (1984); Me.Rev.Stat.Ann., Tit. 17-A- §§107(5) (1983); Mo. Ann. Stat. §563.056 (1951 and 1985 Supp.); Mont.Code Ann. 45-3-106 (1983); Neb.Rev.Stat. §28-1413(5); N.H. Rev.Stat.Ann. §627:5(II), (V); N.J.Stat. Ann. §2C-3-7, 8 (West 1982); N.Y. Penal Law §35.30(2); (McKinney 1974 and Supp. 1985); N.D.Cent. Code. §12.1-05-07.2d(1) (e) (1976); Ore.Rev.Stat. 16.205 (1983); Pa.Stat.Ann. Tit. 18 §508, 509 (Purdon); Massachusetts adopted the Model Penal Code by judicial decision, *Julian v. Randazzo,* 380 Mass. 391, 403 N.E. 2d 931 (1980).

[10]This state is Florida. Alabama has statutory language that appears to allow any degree of force to be used, but it has been limited by decision. *Ayler v. Hopper,* 532 F.Supp. 198 (M.D. Ala. 1981).

[11]Kentucky, North Dakota, New Hampshire and Montana.

necessary in order to maintain discipline,[12] and ten of these, like the Model Penal Code, expressly apply the same standard for use of deadly force to guards as to other law enforcement officials.[13] Finally, though concern for innocent bystanders is implicit in any reasonableness standard, at least six states have statutes which explicitly disallow use of force without regard for third parties.[14]

Ten more states have statutes which apply a reasonableness standard to the use of force by law enforcement officials or persons with a special duty of care for others by means of a statute that is broad enough to include prison officials.[15]

A further group of nine states deal with justifiable homicide in a way that could be interpreted as applying to

[12]Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts (by judicial decision), Missouri, Nebraska, New Jersey, New York, Oregon, and Pennsylvania.

[13]Alaska, Arkansas, Delaware, Hawaii, Maine, Missouri, Nebraska, New Jersey, New York, and Pennsylvania.

[14]These include the states which have adopted the Model Penal Code verbatim, Hawaii, Nebraska. See also Delaware, New Jersey, New York, and Pennsylvania.

[15]Ga. Code §16-3-21(a) (1984); Idaho Code §20-111 (1979) (if reasonably feels that life of self or other is threatened). Indiana has a statute forbidding corporal punishment of prisoners. Ind. Code Ann. §11-11-5-4 (West 1976), and a court decision that holds that the state owes prisoners the same duty of care for protection from harm as that due the general public. *Roberts v. State,* 307 N.E.2d 501, 159 Ind. App. 456 (1974). Iowa Code 804.8 (1983); Kan. Stat. Ann. 21-32115-3216 (1981); Minn. Stat. 609.06, 1065 (1984); N.C. Gen. Stat. §15A-401 (1983); Tex Penal Code Ann. §9.52 (1978); *Williams v. Thomas,* 511 F.Supp. 533 (N.D. Tex. 1981); Maryland has no law directly on point but a decision allows liability for constitutional violations. *McCray v. Burrell,* 622 F.2d 705 (4th Cir. 1980); Michigan also has no statute on point. An Attorney General's opinion states that prison guards are liable to the same extent as private citizens for the discharge of firearms. Op. Atty. Gen. #2208 at 449 (1955-6).

law enforcement officials.[16] Of these only four[17] could be considered as placing no limit on the use of deadly force by prison officials. And even with these a homicide is considered justified only if it is committed in the pursuit of some legal duty. In the remaining five, there is an explicit reasonableness limitation placed on the use of deadly force.[18]

Of the nine remaining states, six have statutes granting immunity to law enforcement officials for the use of deadly force during a riot.[19] Of these, one state requires that such force be reasonable.[20] The remaining states do not have statutes which are pertinent.[21]

Since these statutes generally limit deadly force to only that which is reasonable and necessary but do not explicitly address the context of an emergency situation, more specific guidance on the use of deadly force must be found by examining professional standards and the actual policies of state departments of corrections.

[16]Cal. Pen. Code Ann. §196 West (1970); La. Stat. Ann. 14.20 (1974); Nev. Rev. Stat., §200.140 (1983); N.M. Stat. Ann. 30-2-6 (1978); Okla. Stat. Tit. 21, §732 (1981); Utah Code Ann. 76-2-404 (3) (1978); Vt. Stat. Ann. Tit. 13, §§904, 2305 (1974); Wash. Rev. Code. §9A. 16.040 (3) (1977); Wisc. Ann. 939.45 (1982).

[17]Oklahoma, Nevada, New Mexico and Washington.

[18]Louisiana, Utah, Wisconsin, Vermont. California is a member of this group by judicial decision. *Kortum v. Alkire,* 69 Cal. App. 3rd 324, 333-338, 526 P.2d 241, 245-250 (1974).

[19]Miss. Code Ann. 97-3-15 (d)(1)(g) (Supp. 1984); Ohio Rev. Code, 2917.05 (1982) (deadly force justifiable if threat of serious harm); Tenn. Code Ann. §40-7-109 (1982); Code of Va. 18.2-42 (1950); S.C. Code §24-3-750 (1976); S.D. Code Law §22-16-32 (1979); See also Vermont, *supra.*

[20]Virginia, *see also* Vermont. This survey is not exhaustive of state statutes involving use of force during riots. Those states which follow the Model Penal Code require appropriate warning.

[21]Rhode Island, West Virginia and Wyoming.

2. *Professional standards require that deadly force be used only as a last resort and that appropriate warnings be given.*

The American Correctional Association (A.C.A.) standards are the most widely followed guidelines for the operation of prisons and jails. The standards have been promulgated by the largest national professional organization of correctional officials in the United States and Canada. Not only have these standards had a major influence on the standards issued by the Department of Justice, See *Federal Standards For Prisons and Jails* (1980), at 2, they are also utilized by the Commission on Accreditation for Corrections as the yardstick for evaluating of correctional facilities involved in the accreditation process. In 1980, 600 correctional institutions were involved in that process. This constituted nearly one fourth of the nation's correctional institutions. A.C.A. standard 2-4206, which is denominated "mandatory" for accreditation purposes requires that:

> Written policy and procedure restrict the use of physical force to instances of justifiable self defense, protection of others, protection of property, and prevention of escapes, *as a last resort* and in accordance with appropriate statutory authority. *In no event is physical force justifiable as punishment.* A written report is prepared following all uses of force and is submitted to the administrative staff for review.

A.C.A., *Standards For Adult Correctional Institutions, 2nd Ed. (1981).*[22] (emphasis added)

[22]Paragraph 6.15 of the *Federal Standards For Prisons and Jails* uses the exact language of the A.C.A. standard.

The operational meaning of the A.C.A. standard is fleshed out by the A.C.A.'s model regulation on the use of firearms.[23]

1. Firearms shall be used only in situations where there is danger of death or grievious bodily harm. *Firearms shall not be discharged if less extreme measures will suffice . . .*
2. An officer may fire under the following circumstances.

   a. At an inmate or other person carrying a weapon or attempting to obtain a weapon by force, if the officer has reason to believe that the inmate/person intends to cause death or serious injury.

   b. At an inmate or other person whom the officer has seen kill or seriously injure any person and who refuses to halt when ordered.

   c. At an escaping inmate if the escape is actually in progress and cannot be reasonably prevented in a less violent manner.

   d. At an inmate or person is there is no other way to prevent personal injury or death.

3. *Time permitting, a clear oral warning or order shall be given before shots are fired.*
4. *The firing of warning shots is not mandatory. However, time permitting, such shots shall be fired if there is no reasonable likelihood of serious injury or death resulting to innocent persons.* A.C.A., *Guidelines for the Development of policies and Procedures: Adult Cor-*

[23]*See* A.C.A. Standards 2-4097, 4098, 4185, 4186, 4191, 4206, 4341.

> *rectional Institutions,* (1981), p. 224 (emphasis added).

Moreover, in its model riot control plan, the A.C.A. requires removal of non-participants.

> a. Prisoners not wishing to participate in the riot must be given an opportunity to withdraw from the disturbed area.
>
> b. Prisoners should be provided safe conduct to a non-affected secure area. *Id.* at 299.

Thus, the standards suggested by prison officials from state and federal prisons for use of firearms, and for protection of third parties in riot situations require that oral warnings, and/or warning shots be used, when appropriate, and that non-participants be allowed to get out of the way.

The standards adopted by the American Bar Association are equally emphatic that any use of deadly force must be justifiable:

> *Standard 23-6.13. Use of force or deadly force.*
>
> (a) . . . (ii) *Physical or deadly force* should be authorized when the correctional employee is confronted with a situation that would *reasonably support* an on-site judgment that physical or deadly force is *immediately necessary to* effectuate one of the purposes listed below . . . *Deadly force should not be authorized unless otherwise justified by the law of the jurisdiction governing self defense or the defense of others.* American Bar Association, *Standards For Criminal Justice, Legal Status of Prisoners,* Standard 23-6.13, (1981). (emphasis added)

The commentary to the ABA standard underscores the need to carefully limit the use of deadly force:

> At first blush, there might appear to be three instances in which correctional authorities and officers may feel justified in using force in the prison setting where there would be no comparable circumstances in free society, namely to prevent escape, to regain control of an institution after an inmate takeover, and to enforce prison rules and regulations. Nevertheless, despite the seriousness of these three types of situations, *there can be no disputing the fact that force should be used only when reasonably necessary. Even then, the level of force used should not exceed the form or degree necessary to accomplish whatever purpose justifies the use of force. Id.* (emphasis added).

All of these standards converge on the point that deadly force is to be used only when reasonable, and not in any degree greater than needed to accomplish the purpose justifying its use. Moreover, as pointed out earlier, the standards agree on the point that the standard to be applied to the use of force by prison officials should be no lower than that applied to police officers.

3. *Actual Prison Policies Prohibit the Unnecessary or Excessive Use of Force.*

Equally important as professional standards is the fact that the principles embodied in them have been adopted by many departments of corrections.[24] Based on a survey

[24]The Federal Bureau of Prisons claims adherence to both the A.C.A. standards and the Justice Department's *Federal Standards for Prisons and Jails.* Title 42 U.S.C. §1997f(5) requires the Attorney General to report to the Congress on "progress made in each Federal Institution toward meeting existing promulgated standards for such institutions. . ." In several reports to Congress the Department noted that the Bureau has taken steps to obtain accreditation from the Com-

conducted by *amici,* we excerpt *infra,* selected examples of policies and procedures. Copies of the policies of these states and others are available from *amici* and will be provided upon request.

ALASKA

Policy Number 803.09 (January 21, 1985)

"Time permitting, a clear verbal warning or order must be given before shots are fired. . . . Before the application of deadly force, all other reasonable means of control must be exhausted. As policy, whenever possible, a show of force will be made prior to the application of force. Deadly force will be applied only as a last resort. Corporal punishment in any form and/or the application of excessive force is prohibited."

ARIZONA

Special Order 690.8.8 (July 1, 1983)

"In no event is force considered justifiable as punishment or discipline. Physical force is used as a last resort and when used must be limited to that amount necesary to control and/or move inmates."

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mission on Accreditation for Corrections for each of its facilities and that to date, 34 of the Bureau's 45 institutions have been accredited. See e.g. *Fiscal Year 1984 Report to Congress Pursuant to the Civil Rights of Institutionalized Persons Act,* at 28. An earlier report stated that the "[t]he goal of the federal system . . . is that all federal correctional facilities be (1) accredited by the Commission on Accreditation for Corrections, and (2) meet the Federal Standards for Prisons and Jails issued by the Department of Justice." *Report of the Attorney General to Congress Regarding Activities Initiated Pursuant to the Civil Rights of Institutionalized Persons Act,* 42 U.S.C. §1997 [as required by 42 U.S.C. §1997], pp. 12-13.

ARKANSAS

Administrative Regulation #30409(8)
(February 23, 1980)

"An employee shall use deadly force only to save his own life or the life of another immediately threatened by an inmate. All alternative methods of controlling the inmate must be ineffective to justify use of a firearm. . . . The firing of a weapon where it may endanger other individuals is ordinarily not appropriate."

FLORIDA

Policy Number 323.0666 (June, 1985)

"When circumstances permit, a warning shot should be given before bodily injury is inflicted. . . . [Deadly force will be used] only as a last resort when it reasonably appears that alternatives are not feasible . . . only that amount and type of force [may be used] that reasonably appears necessary. . . . Firearms shall not be discharged when there is a substantial danger to innocent bystanders."

IOWA

Policy Code 1

"Use of deadly force to stop an escape . . . In a loud voice, twice call the inmate to HALT . . . Warning shots shall never be fired. . . . Use of deadly force is justified only under conditions of extreme necessity as a last resort to protect the life or safety of staff, other inmates or bystanders . . ."

MICHIGAN
Policy Number R791.5564

"Where the circumstances permit [gunfire] shall be preceded by either an oral warning or a warning shot. . . . force shall be used only after all other reasonable alternatives are exhausted. Only the force necessary in the circumstances shall be permitted."

MINNESOTA
Policy Number 3-208.0

"It is imperative that the least amount of force necessary in any given circumstances is the amount used. Excessive use is dysfunctional from an institutional standpoint and is inconsistent with providing the most humane environment possible. Deadly force may be used only as a last resort."

MISSOURI
Title 14, Div. 20, Chap. 10; 20-110,060

"Use of any type of force for punishment or reprisal will be strictly prohibited . . . only the minimum force necessary for control shall be used . . . Deadly force will be used only as a last resort and only when there is no other way to prevent grievious personal injury or death to oneself or another person."

NEW YORK
Title 7 N.Y.C.R.R. §251.2(f)(1)

"Firearms . . . shall not be used except as a last resort and then only in situations where the employee reasonably believes that deadly physical force is necessary . . . Before aiming a

firearm at any person, an employee shall, whenever possible, give due warning, orally or by firing a shot to the air or in some other readily understandable manner. . . . corporal punishment is absolutely forbidden for any purpose and under all circumstances. (§250.3) . . . Where it is necessary to use physical force, only such degree of force as is reasonably necessary required shall be used." §251.1

OHIO
Policy Number 5.20-9-01

"Whenever possible, an appropriate warning shall be given prior to the use of deadly force. *In no event shall a warning with a firearm be appropriate within a building.* (original emphasis) . . . Force or physical harm to person shall not be used as prison punishment. . . . Excessive force means an application of force which exceeds that force which is reasonably necessary under all the circumstances."

SOUTH CAROLINA
Policy Number 1500.2 (October 2, 1979)

"Use of force is never justified as punishment . . . [Firearms] may be used only as a last resort and only after appropriate warnings have been given to stop prisoners in flight." Policy 1500.8, at 5 (March 5, 1980). The new draft policy prohibits discharge of a firearm "when it appears possible that an innocent person will be hit." *Id.* §7(a).

VIRGINIA
Guideline 412 (October 1, 1983)

". . . a warning shot may be used if in the opinion of the officer it can be fired safely. Firearms shall

be employed only as a last resort . . . when all other alternatives have failed."

WISCONSIN
HSS 306.07

". . . insofar as it is feasible . . . verbally warn the inmate to stop the activity giving rise to the use of the firearm and inform the inmate that the staff member possesses a firearm. If the warning is disregarded, fire a warning shot. . . . only so much force may be used as is reasonably necessary. . . . Use of excessive force is forbidden. . . . Deadly force may not be used if its use creates a substantial danger of harm to innocent third parties unless the danger created by not using such force is greater than the danger created by using it."

WASHINGTON STATE
Police Directive, 420.208, 6.B.i.a. and b
(August 10, 1984)

policy requires a "verbal order to cease and desist" and a warning shot.

IV. THE JURY SHOULD HAVE BEEN ALLOWED TO DETERMINE THE MERITS OF RESPONDENT'S CLAIM.

Amici take no position as to whether Mr. Albers' rights were violated or whether he should be awarded damages.[23] However, applying the principles asserted in this brief we

[23] *Amici* claim no expertise regarding the qualified immunity defense raised by the Petitioners. However, we believe that the right of prisoners to be free of gratuitious and excessive force was "clearly established" by 1980. *Harlow v. Fitzgerald,* 102 S.Ct. 2727 (1983).

believe that he submitted evidence entitling him to a jury determination of his claim.

Albers produced evidence which tended to show that there was no justification for shooting *him* without any warning. Whatever rationale may have existed for other shootings, there is evidence that he was well known to be a well-behaved inmate, that he did not participate in the disturbance, and indeed that he was cooperating with Petitioner Whitley up until the shooting. At the time Albers was shot he was unarmed, and was fleeing by the only route available to his own cell and safety. It is arguable that there were several points before the shooting when Albers could have been warned or told to halt.

A jury also might have concluded that the giving of an order to shoot *anyone* who went up the stairs regardless of identity or circumstances was itself "clearly disproportionate to the need reasonably perceived at the time." 743 F.2d 1372.

Again, while *amici* have no view as to the proper outcome of Mr. Albers' trial, we think it is clear, however, that he was entitled to have that outcome decided by the jury.

CONCLUSION

For the foregoing reasons *amici* urge this Court to affirm the opinion of the Ninth Circuit.

Respectfully submitted,

Michael Mushlin
Counsel for *Amicus*
Correctional Association of N.Y.
c/o Pace University
School of Law
78 North Broadway
White Plains, N.Y. 10603

Steven Ney
Special Counsel for *Amicus*
Pennsylvania Prison Society
1616 P Street, N.W.
Washington, D.C. 20036

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